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Supreme Court, U.S.
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IN THE
Supreme Court of The United States

OCTOBER TERM, 1992

JUAN LUIS BOSCIO,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether specific inducement is to be alleged in the indictment and if a showing is required that the Public Official induced the payor's consent by some affirmative act such as demand or solicitation, and if the indictment can be amended by the evidence at Trial, (over defendants objection) to bring evidence of demand and solicitation which was absent from the allegations in the indictment and out of the time-frame given in the indictment.

II

Can a conviction stand where Brady Materials have been intentionally withheld by the government, which did not permit complete full cross-examination of main witness, which in turn permitted perjured testimony and a false theory to stand uncorrected?

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IN THE

Supreme Court of the United States

October Term, 1992

JUAN LUIS BOSCIO

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION

TO THE HONORABLE COURT:

NOW Comes Petitioner Pro-se and respectfully prays, from this Honorable Court to issue a Writ of Certiorari to review the Judgment entered on January 21, 1992 by the Court of Appeals for the First Circuit Affirming Petitioner's conviction and the Order of March 19, 1992 denying petition for rehearing and denying suggestion for rehearing en banc.

I. OPINION BELOW

a) Judgment affirming conviction of the United States District Court for the District of Puerto Rico by the United States Court of Appeals for the First Circuit Cases No. 89-1253, 89-2022, Judgment rendered on January 21, 1992. APPENDIX I, P. 3a.

b) Order of the United States Court of Appeals for the First Circuit denying Rehearing and the suggestion for Rehearing en Banc entered on March 19, 1992. APPENDIX III, P. 35a.

c) Order of the Supreme Court of The United States extending the time for filing a Petition for Writ of Certiorari to and including July 17, 1992. APPENDIX XI, P. 66a

II. JURISDICTION

The Judgment of the Court of Appeals was entered on January 21, 1992. A Petition for Rehearing was denied on March 19, 1992.

This Honorable Court has Jurisdiction to review by Writ of Certiorari under the provisions of 28 U.S.C. 1254(1) and Rule 10 of the Rules of the Supreme Court if the Petition is filed with the Clerk of the Supreme Court within 90 days of the denial of the rehearing as established in Supreme Court Rule 13(1 and 4).

III. PERTINENT LAWS AND CONSTITUTIONAL PROVISIONS INVOKED IN THIS CASE.

Fifth Amendment of the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to twice put in jeopardy of life or limb; nor shall compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, without due process of law; nor shall be private property be taken in public use, without just compensation."

18 U.S.C. Section 1951(2) Hobbs Act. Interference with commerce by threats or violence:

(a) Whoever in any way or degree obstructs, delay or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section-

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State Through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. Section 3500 (Jenks Act.)

(This provision is very lengthy and we have included the same as Appendix IX at P. 60a, in accordance with Rule 1K.)

IV STATEMENT OF THE CASE

This is a highly publicized case which has become a political issue on two separate elections. The case has allegedly been for violation of Section 1951 and (2) of Title 18 U.S.C., where the indictment charges Petitioner with Three counts of said violation, which charges that Jose Tormos-Vega, Juan Luis Boscio and Miguel A. Serrano, together with Irding Chardon the Tormos and others to the Grand Jury known and unknown, with extortion and conspiracy to commit extortion.

This case is about the former Mayor of the Municipality of Ponce, Jose Tormos-Vega and Juan Luis Boscio, a former member of the Municipal Assembly, who allegedly committed extortion and Miguel Serrano, former Vice President of Shearson American Express of Puerto Rico.

It is alleged that in order to accomplish their goal, each one received $110,000 for authorizing a series of transactions between the Ponce Municipal Development Authority, Miguel Serrano doing business as Ponce Developers Inc., Home Federal Savings and Shearson American Express of Puerto Rico.

Miguel A. Serrano was also indicted on One Count of the conspiracy and his case was dismissed Pre-Trial by Judge Carmen C. Vargas de Cerezo, on the grounds that his immunized testimony given at Televised Public Hearings conducted by the House of Representatives of the Commonwealth of Puerto Rico, was improperly utilized by the Government to seek the indictment in violation of the Doctrine established in *Murphy v. Waterfront Commission of New York Harbo*r, 378 U.S. 52 (1964); and *Kastigar v United States,* 406 U.S.441 (1972).

This prosecution is One of Three Cases investigated by

Two consecutive Grand Juries. The First Case was directed against Serrano alone, United States v. Miguel Serrano, U.S. District Court of Puerto Rico, Criminal Number 84-381 to which Serrano plead guilty in Three Counts involving a series of fraudulent transactions with Home Federal Savings and Loan Association of Puerto Rico.

The Second Indictment, which was produced by the grand jury investigation, was against Juan Luis Boscio, William Stamps and Miguel Serrano, where Petitioner was convicted for One Count for aiding and abetting as charged and affirmed by the First Circuit Court in Case No. 85-1913.

The transaction that provoked the indictment in Case 85-1913 and for which Boscio was convicted for aiding and abetting in a wire-fraud (18 U.S.C. 1343) was one of the series of transactions which was brought to trial for a second time in the case at bar.

The Third Indictment (the case at bar) charge Jose Tormos-Vega, Juan Luis Boscio and Miguel Serrano with a conspiracy to obstruct commerce by extortion in Count One. Count Two, charge Tormos-Vega and Boscio with extorting money from Serrano and Count Three, also charges Juan Luis Boscio with a second act of Extortion.

The Grand Jury investigation was conducted in the shadow of an intensely partisan widely publicized debate at the same time that Televised Public Hearings were conducted by the House of Representatives of the Commonwealth of Puerto Rico and where Miguel Serrano, testified under absolute criminal and civil immunity for which the indictment was dismissed as aforementioned, since his immunized testimony was utilized by the government to procure the indictment.

The Indictment (APPENDIX IV, P. 37a) incorporates the

general allegations to the Three distinct Counts and no other allegations or overt acts from Count One are incorporated to subsequent Counts Two and Three.

The indictment expresses that the conspiracy took place "from about June 6, 1983, up to on or about August 29, 1983" in the District Court of Puerto Rico",and within "the Jurisdiction of this Court."

The indictment further states at averment Number Three(3) Count One: "That Jose Tormos-Vega and Juan Luis Boscio, would obtain and did obtain One One Hundred and Ten Thousand Dollars for a total of Two Hundred and Twenty Thousand Dollars, which was induced by extortion under color of official right"; but, it does not say **when** and **how** the inducement or demand took place, within the timeframe given at the indictment, (Which is June 6,1983 to August 29, 1983. The indictment is silent to any demand made by any of the co-defendants.

The Trial of this Case began on May 26, 1988 and a verdict was returned on June 15, 1988.

At the time Petitioner is alleged to have commited extortion, he was doing other transactions with Miguel Serrano, for which Serrano paid him for his independent role as a practicing Attorney, as stated Mr. Serrano, when cross-examined by Mr. Toro, Petitioner's attorney; Mr. Serrano said that Mr. Boscio had worked for his money. APPENDIX VII Pages 46a-55a. (Trial Transcript for June 10, 1988 Crim. Case Number 85-449(CC) Pages 10 to 16).

When Mr. Serrano was confronted with his immunized testimony before the House of Representatives where he said:

"Answer: "Well I am going to answer to that question . . .

Two parts, if I am allowed. In the case of Attorney Juan Luis Boscio, I PAID him the money because I understood that he DESERVED it, because he worked hard with me. I go back to what I said before, give to Cesar what is rightfully Cesar's. Really the man worked very hard and even left his law practice and attended to deal with me about details and when I had to go to New York, he always went with me - He helped me a lot".

I said that yes. I did. I did."

At Page 12 Trial Transcript (APPENDIX VII, P. 46a-55a.) Mr. Toro asked him:

The truth of the matter is, Mr. Serrano, that Mr. Boscio worked hard for his money, didn't he?

A - "That is correct."

Then, the Prosecutor at recross, confronted Serrano with what he had testified and he reaffirmed himself as to that as follows: (APPENDIX VIII P. 46a.) (Trial Transcript at Pages 12 to 13.)

Q - When you testified then in the House of Representatives regarding the $660,000, how does that testimony compare you have given here?

"Its identical. I haven't even refuted what Mr. Toro Cuberge said here. I said I reaffirmed myself in what he was reading."

At the following page 13 (T.T.) APPENDIX VIII P. 46a, the Prosecutor wanted to establish that the Universal Tank Transaction (the transactions between Mr. Serrano and Boscio) was unrelated to his payment as follows:

Q - And the Universal Tank Transaction does not have anything to do with the $660,000 commission?

A - "In total scope yes."

A - "When you look at the WHOLE PICTURE."

Miguel Serrano was not announced as a witness, he was brought to trial in an attempt to establish demand and inducement. The government was conscious of the fact that Petitioner had been paid for his work as a Lawyer in Private Practice. (Petitioner reported the income derived from the payment received from Serrano in his Income Tax Returns for the year 1983.) The witnesses presented by the Prosecutor were prepared so, that Petitioner would be divorced from the Universal Tank transaction, from where Petitioner had collected his fee.

Witnesses did not remember crucial facts or either denied those facts purposely, so as to prevent any evidence that could exculpate Petitioner to be transmitted to the Jury and the government did not reveal evidence which was exculpatory and witnesses 302's were withheld, which could have been utilized in proper cross-examination and which would have permitted Petitioner to rebut and prove that other witnesses were giving false testimony.

The most crucial testimonies in the case against Petitioner Boscio, were Rosario Camacho, the Home Federal Savings, Branch Manager and Miguel Serrano, Vice-President at Shearson American Express.

Mrs. Camacho was very elusive when she was interrogated and denied any connection between Petitioner and the loan of $14,000,000 granted by the Bank. (Boscio has always contended that he was paid for the work he had done in connection with said loan as a private practicing attorney.)

The Prosecutor presented in evidence One page of Ponce Developers Account (Mr. Serrano's account at Home Federal Savings) and Petitioner's attorney objected to it because it was an incomplete statement and the prosecutor said that it was the only page he had and the judge overruled and the government was allowed to introduce into evidence the isolated page which excluded the remainder of the statements, which as we discovered after Trial showed the Deposits pertaining to the Universal Tank transaction which could have been utilized to properly cross-examine said witnesses.

In the Direct Examination by the prosecutor Mr. Serrano testified, that he had "earmarked" in June,(1983) a $100,000 Certificate of Deposit for future payment to Mr. Boscio. (The C.D. to which Mrs. Rosario Camacho, had testified as having being withdrawn from the $660,000 payment, that Mr. Serrano had taken from the Municipality.) Boscio objected to the testimony since the certificate of deposit was not introduced in evidence. The trial Judge overrruled.

The Certificate of Deposit, **was never introduced in evidence** and the Prosecutor introduced into evidence a chart, Appendix VI Page 45a, which shows that Petitioner collected his fee from the money Serrano had collected from the Certificate of Deposit, that is The Municipality thus establishing to the Jury that Mr. Boscio was paid from the Municipal funds, (Trial Exhibit 36.)

Furthermore, Mr. Serrano, over Defendant's joint objections on the grounds of variance, testified and the Court permitted it, that Mr. Boscio had approached him in **April or May, 1983** and asked Mr. Serrano, what was in it for him, as to prove demand, that which was not alleged in the Indictment, nor is it within the Indictment's **time frame**, which is **June 6, to August 29, 1983**. Again, and over the Defendants joined objection, on the grounds of **variance**, Miguel Serrano

testified that on **September, 1984**, (more than a year after the last date given in the indictment) Mr. Tormos, himself and Mr. Boscio had met to cover-up the payment made to Mr. Tormos at Florida, which is **another Jurisdiction**, because the indictment appraised that all acts alleged were committed **within the Jurisdiction of the U.S. District Court for the district of Puerto Rico**.

Petitioner Boscio, was convicted on June 15, 1988.

On December 2, 1988,(almost six months.after Trial) Mrs. Beatriz de la Torre, a Journalist from the **San Juan Star**, was having dinner at a local restaurant in Ponce, Puerto Rico, with Mr. and Mrs. Boscio. After dinner, she had to phone the Newspaper Offices and Mrs. Boscio accompanied her to the public telephone, which is located outside the Dinning Room and there Mrs. Boscio was approached by Mrs. Rosario Camacho, who greeted her and they conversed in front of Mrs. de la Torre; during the conversation, Mrs. Camacho admitted that she had given perjured testimony at Trial and that during the month of August, 1988,(two months after Trial) she had given **new testimony** at a Deposition in the related Civil Case, where she had corrected some of her trial testimony.

Once Mrs. Boscio gained knowledge of the existence of said Deposition, and new testimony, she contacted one of the Attorneys for Shearson American Express; Fiddler, Gonzalez & Rodriguez and they provided a copy of said Deposition.

Upon examining the Deposition, with accompanied exhibits, we made several important discoveries.

First: That the Federal Savings and Loan Insurance Corp. had been provided the Civil Case against Shearson, **the grand jury minutes**, which Mrs. Camacho had at the Deposition.

Second: That at the Deposition, Mrs. Camacho had copies of several 302's of interviews by the F.B.I. (Dated May, 4; May 21; June 11; October 5; and November 6, 1984) None of those 302's, that were made available to FSLC for Civil litigation were not provided to Petitioner Boscio.

Third: When Rosario Camacho was confronted with the same check to Mr. Boscio for $50,000 that she had denied at Trial as being Mr. Boscio's legal fee for the Universal Tank closing she admitted at the deposition that it was Mr. Boscio's legal fees.

Fourth: Through the Deposition and its accompanying documents we found among other, **the $100,000 Certificate of Deposit**. See **Appendix V** Page 44a. The Certificate of Deposit was mentioned and objected as hearsay, because the document was not presented into evidence. Witness Serrano, testified at Trial that this Deposit had been "earmarked" for payment for Mr. Boscio.

But as the new evidence shows the C.D. din not mature until **September 15, 1983**, so that the payment to Mr. Boscio was not from the Municipality, because it came from Mr. Serrano Accounts as alleged in the indictment on August 25 and 29, 1983, from other funds deposited on August 1, 1983, the day of the closing of the Universal Tank Loan from the proceeds of said loan for which Boscio was paid.

The government presented the Chart, (Trial Exhibit 36) and stated: "that the purpose would be to show that everything that appears there is reflected in the evidence in the case already." Defendants stipulated to the Exhibits but stated: "We are naturally not accepting that this is true. What we are accepting is that— that —is the theory of the government. See: Trial Transcript June 10, 1988, Page 36. (**Appendix X, Page 62A, June 10,1988 Redirect examination of Miguel Serrano.**)

If the government would have presented the Certificate of Deposit, which **would have been exculpatory**, it would have impeached Serrano's testimony and would have rebutted the Government's theory and summary. See: **Appendix VI**, Page 45a, (Chart as presented in Evidence by the government showing source and distribution of money received by Boscio.) But, instead, the Government, to obtain a conviction, chose not to present the Certificate of Deposit and let Serrano's testimony stand uncorrected.

A Post-trial Motion to Dismiss was filed, and a Motion for a New Trial for Newly discovered evidence; both of which were denied without a Hearing and Petitioner was sentenced on February 10, 1989 to Twelve Years imprisonment in each of Three Counts to run concurrently with each other and fined $5,000 as to each Count.

V. ARGUMENT

POINT I

Whether specific inducement is to be alleged in the indictment and if a showing is required that the Public Official induced the payor's consent by some affirmative act such as demand or solicitation; and if the Indictment can be amended by the evidence at Trial; (over defendants objection) to bring evidence of demand and solicitation which was absent from the allegations in the indictment and out of the time-frame given in the indictment.

As we have stated in our averment of fact, the government, through Miguel Serrano's testimony brought several significant variances, which amended the indictment, nor did occurred in the time frame given at the indictment.

It is a basic principle that in order to guarantee protection of a criminal defendant's rights, an indictment must contain the elements of the offense intended to be charged and sufficiently appraise the defendant of what he must be prepared to meet at trial. *Russel v. United States*, 396 U.S. 749, 763, 82 S.ct. 1038, 1046, 8 Led 2d 240.; and the Fifth Amendment assures the defendant that the government will try him on the charges the grand jury voted, not on some other charges that are not made in the indictment against him. *Stirone v. United States*, 361 W.S. at 217, 85 S.Ct. at 273; See also: *Samburq v. United States*, 418 U.S. 87, 177 S.Ct. 2887, 41 Led 2d 50 (1974).

The indictment in this case did not establish specific acts in which either Tormos or Boscio asked or demanded payment to act, or not to act. The indictment alleges that both of them were acting as officials of the Municipality and merely parroted the statute, by simply stating:

"On or about June 7, 1983, in the District of Puerto Rico, and within the Jurisdiction of this court the defendants, Jose Tormos Vega and Juan Luis Boscio the defendants herein, aiding and abetting each other, did unlawfully, knowingly and willfully commit extortion, as the term is defined in Section 1951(b) (2) of Title 18, United States Code, that is defendants herein did obtain one hundred and twenty thousand dollars from Miguel A. Serrano, in his capacity as Vice President of Shearson American Express with the consent of Miguel Serrano, such consent having been wrongfully obtained **under color of official right**, as the term is used in Section 1951 and (2) of Title 18 United States Code, and said extortion did have an effect in commerce, as the term is defined in Section 1951(b)(3) of Title 1.8 United States Code, Section 1951 and 1." See: **Appendix IV** Pages 3a-33a.

The indictment missed to state where, when and how the demand for payment was made.

The government had in its mind when presenting the case and the indictment to the grand jury that they had to allege and prove only **that the defendants received a payment while acting under official** Capacity and that was enough to sustain a conviction

There is discrepancy in the several circuits as to the need to allege and prove some affirmative act of inducement.

The First Circuit goes along with the Circuits which established that the color of official right element required no more than proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions.

Following this reasoning are *United States v. Spitler*, 800 F2d 1267, 1274 CA 4 (1986); *United States v. Paschall*, 772 F2d 71 (CA 4 1985).

The Second Circuit in *United States v. O'Grady*, 742 F2d 682 (1984) and the Nine Circuit in: *United States v. Aguon*, 851 F2d 1158 (1988) have followed a different rule since they held that some affirmative act of inducement by the official had to be shown to prove the government's case. (The First Circuit has not passed on the **O'Grady-Aguon**, analysis. See: Courts Opinion at Page 18, **Appendix I** Pages 3a-33a.

The Supreme Court recently stated in *McCormick v. United States*, 59 U.S.L.W. P.4474 as follows:

"Until the early 1970's, extortion prosecutions under the Hobbs Act rested on allegations that the consent of the transferor of property had been "induced by wrongful use of actual or threatened force, violence, or fear-"; public official right" phrase standing alone. Beginning with the conviction

involved in *United States v. Kenny*, 462 F 2d 1205 (CA3 1972), however, the federal courts accepted the government's submission that because of the disjunctive language of Sect. 1951(b)(2), allegations of force, violence or fear were not necessary. Only proof of the obtaining of property under claims of official right was necessary. Furthermore, every Court of Appeals to have construed the phrase held that if did

not require a showing that the public official "induced" the payor's consent by some affirmative act such as a demand or solicitation. Although there was some difference in the language of these holdings, the "color of official right" element required no more that proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions. In 1984, however, the Court of Appeals for the Second Circuit, en banc, held that some affirmative act of inducement by the official had to be shown to prove the Government's case. *United States v. O'Grady*, 742 F 2d 682 (1984). In 1988, the Ninth Circuit en banc, agreed with the Second Circuit, overruling a prior decision expressing the majority rule. *United States v. Aguon*, 851 F.2d 1158 (1988). Other courts have been unimpressed with the view expressed in *O'Grady and Aguon*. See: e.g., *United States v. Evans*, 910 F2d 790-797 (CA 11 1990) cert. pending No. 90-6105; *United States v. Spitler*, 800 F2d 1267, 1274 (CA 4 1986); *United States v. Paschall*, 772 F2d 71 (CA 4 1985).

The conflict on this issue is clear, but this case is not the occasion to resolve it . . . (Emphasis provided.)

There is conflict between the circuits on whether it is or not required that a showing that the public official affirmatively induced the payment to prove the government's case. If the affirmative act was to be shown, that was an element of the offense, then, being an element of the offense, the indictment could not have been amended to show affirmative inducement

by the evidence. The amending evidence to prove the affirmative act was then, an impermissible amendment to the indictment and the Supreme Court will have to settle the conflict between circuits to settle the issue.

In all probability, the Supreme Court will grant Certiorari, specially when it recognizes the pending issue in *McCormick*. (Supra) Rule 10 of the Supreme Court points out as one of the reasons to grant certiorari review is "when a United States Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter..."

The Supreme Court did not settle the conflict in *McCormick*, (Supra) but recognized it and stated that that case is not the occasion to resolve it. We think that the case at bar, will be an occasion to solve it, since the inducement was not specifically alleged and it was brought to the court through **variance**, (as an amendment to indictment) which was an error which we pointed out to the Court and was never decided, neither in the Opinion of the Court nor when denying the Motion for Rehearing.

Furthermore, the Supreme Court has granted Certiorari in *United States v. Evans*, Case No. 90-6105, 111 S.ct. 2256, 114 L.ed 2d 708 (June 3, 1991), which presents a similar issue for review, as the one presented herein.

At Trial, the prosecutor was faced with the predicament that the indictment did not contain the essential element of demand and tried to establish said demand by having Serrano testify that Boscio on "April or May had asked what is in it for me". (We objected to that as variance, since the indictment did not appraise defendant of what to confront at trial) That was an impermissible amendment to the indictment because that alleged statement was "out of the time frame" of the indictment and specific inducement was not alleged, either.

The Judge permitted the Variance.

The statement of "what is in it for me", is not demand or inducement, either. Even if that had been alleged in the indictment, that cannot constitute demand. To constitute inducement, the person asking for payment, had to demand it and had to tell the person making the payment that he would or would not act if not paid and that is absent from this case.

In Petitioner's case, it has been established that he was paid for the work as stated in the averment of fact. Serrano paid him because he had in his mind that he had "worked hard" for his money.

"Well, I am going to answer to that question in two parts, If I am allowed. In the case of Attorney Juan Luis Boscio, I paid him the money, because I understand that he **deserved it**, because he worked hard with me..."

Serrano did not pay Boscio because he felt menace, he paid him because he "deserved it" and that is what he had in his mind that moved him to make the payment.

It is important to bring to the attention of the Court, that Serrano was also indicted in this case. Justice Scalia in his concurring opinion in *McCormick* stated: (59 U.S.L.W. P.4480)

"Finally, where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime Bribery, *not extortion* and like all bribery laws I am aware of (but unlike Section 1951 and are the other extortion laws I am aware of, *it punishes not only the person receiving the payment but the person making it.*)"
(Emphasis provided.)

Thus, we can conclude that **the qrand jury indicted Serrano**, the person making the payment, and also Boscio and Tormos, **since they were confusing the law and determined a bribe was an extortion**.

The Fifth Amendment guarantees the defendant the right to be convicted of the offenses presented in an indictment **returned by a grand jury, and a substantive amendment to an indictment is** reversible error. An indictment is amended when the prosecution or the court alters the charging terms of an indictment, either literally or constructively, after the grand jury returns an indictment. See: *Stirone v. United States*, 361 U.S. 212, 217-19 (1960).

In *Stirone*, (Supra)the Court expressly stated: "Yet because of the courts admission of evidence and under its charge **this might** have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. (Emphasis provided.)

POINT II

Can a conviction stand where Brady Materials have been intentionally withheld by the government, which did not permit complete full cross-examination of main witness, which in turn permitted perjured testimony and a false theory to stand uncorrected?

The Circuit Court upon deciding this issue stated that:

"due process violation occurs only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" citing *United States v. Bagley*, 473 U.S. 667, 682, and that our approach (to Jenks Act) claims has been determined

whether the defendant has been prejudiced by the governments' (negligence) failure to disclose. Citing *U.S. v. Izzi*, 613 F.2d 1205, 1212 (lst Cir. (1980).

The Circuit Court stated that the heart of the prosecution was simply that Boscio had "obtained property from Serrano under color of official right, which pocket of Serrano it came from was not in itself an essential issue..." and assuming the jury believed the funds were paid for the corrupt purpose to which Serrano testified, *the precise source was of little consequence.*

Even assuming the Funds' source has some relevance, Boscio does not explain, or the later discovered evidence, prevented him at Trial from presenting aspects of his defense. *Nothing prevented Boscio from summonsing bank statements and other evidence* material to identify the sources of funds in the various accounts. Being familiar with *his own role as attorney* and his relationship with Serrano and the others, Boscio was well able himself to know what evidence he wanted and to go after it *before Trial.*"

The consequences of the non disclosure by the Government was very prejudicial for several reasons, especially permitting false evidence to stand uncorrected.

The Government prepared and submitted into evidence a Chart which was **Blown-up** to show how Boscio had collected from Municipal funds -through the $100,000 C.D. dated June 17, 1983- so as to link Petitioner with collecting Municipal funds and to hide any possibility that the Universal Tank Loan could have surfaced and that in no way the jury could have inferred that Boscio had collected from that transaction. The government emphatically denied haying had the "C.D.", which was not true, since the government had obtained all the records from the Bank. How could the government have prepared the Chart, if they never had the

Certificate of Deposit?

The Chart was false and Serrano's testimony was also false, and the government intentionally, let it stand uncorrected.

The Circuit Court saw no importance,on Boscio's source of funds and stated that the precise source was of little consequence, we respectfully disagree with First Circuit Court's conclusion for the following reasons:

Petitioner had diligently done all discovery efforts provided by the Rules and information was not handed to him.

The Court emphasizes Boscio's role as an attorney placing on him a higher burden of discovery that would be required from defendants that belong to other professions, which we believe is unfair and insidious to Due Process, since all accused of crime should be measured in an equal manner and awarded the same rights.

Serrano was not announced as a witness and Petitioner had no reason to expect that he would be brought as a **surprise witness**. Then, How could Boscio have summoned the information that was under government control when in the middle of Trial, the Prosecutor denied he had it? Does a defendant has to presume the government will hide evidence and do more efforts that the mechanism provided by the Rule of Discovery, anticipating fowl play from the government?

The Rule of conduct is that the government seeks to make justice and not to win cases at any cost. See: *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 Led 1314. (1935).

Every defendant that chooses to stand trial has faith that such a norm of conduct is the one governing criminal trials

because otherwise, it would be futile to go through all the hardships of trial knowing that the government would be at liberty to do anything to obtain a conviction. The limitations placed on the government is the difference between Totalitarianism and Democracy.

The failure to disclose was highly prejudicial to Petitioner's case for the following:

If the missing pages of Serrano's Account at the Bank and the Certificate of Deposit had been provided to Boscio, then Serrano would have been properly confronted with that evidence and he would have had to admit, that Boscio put the Universal Tank Loan together with him, traveled extensively, etc. for which he was paid.

The Chart prepared by the government would have been exposed as false and the "earmarked C.D. theory", by Serrano would have also, being exposed as false.

What would the jury had done, if it was proven that Serrano had lied and the government had presented a false theory as to Petitioner's sources of money?

The jurors knowing that Serrano had lied in all probability would not have given credibility to the rest of his testimony and a reasonable doubt would have generated in their minds as to Boscio's guilt.

Petitioner was entitled to the evidence withheld, and entitle to expose the falsity of the evidence and therefore, entitled to having being able to generate that reasonable doubt in the jurors. To have disabled his defense team from having done so, (by withholding evidence) was a reversible error that demands a New Trial, where Serrano, the main

witness for the prosecution, could be properly confronted to extract the truth, which is one of the main goals of a trial.

The First Circuit Court concluded that the heart of the prosecution was that Boscio had obtained property from Serrano, under color of official right. Which pocket of Serrano's the money came was not in itself an essential issue. But **veracity** and **reasonable doubt** was the issue.

Those incidents were not a of little consequence as the Court determined, but were of utmost importance and should have reached the jury, since it is the core of our criminal justice system, that a defendant has to be pronounced guilty beyond reasonable doubt

If the jury had seen the truth after proper confrontation of Miguel Serrano with the evidence withheld,wouldn't they have asked themselves:

Why would Boscio declare the bribe money in his Tax Returns and do the Universal Tank deal for nothing?

Once the jury had the true picture, then they could have reached the conclusion that Boscio declared the money received in his Tax Returns (Tax Returns were filed on April, 1984 before any investigation had begun) because he had nothing to hide, having received a legitimate payment for work performed. The withholding of evidence was indeed very prejudicial to Petitioner Boscio.

Due Process considerations requires a New Trial to be granted when the government either knew, or should have known that the evidence it used at trial, was false evidence; This requirement for a New Trial exists, even when the government did not solicit the false evidence, but only let it stand uncorrected. *Giglio v. United States*, 405 U S 150 Quoting *Napue v. Illinois* which is by itself authority for the

need to grant a new trial, when false evidence has been used to obtain a conviction. See also: *Alcorta v. Texas*,355 U.S. 28 (1957); *Miller v. Pape*, 386 U.S.1 (1967).

Thus, if reasonable doubt could have been generated and if disclosure of the evidence had occurred, then the evidence was material to guilt or innocence and the conviction should be reversed, as stated by the Supreme Court in *United States v Bagley*, 473 U.S. 667:

"*Impeachment evidence as well as exculpatory evidence* falls within the scope of the rule that the failure of the prosecutor to disclose evidence favorable to an accused violates due process where the evidence is material to guilt or innocence..." (Emphasis provided.)

The Certificate of Deposit, intentionally withheld by the government, was exculpatory because if it had been available, it would have permitted effective cross-examination of Serrano, and when presented in evidence, it would have exposed the government's theory as false and a reasonable doubt as stated above, would have been generated.

In *Brady v. Maryland*, 373 U.S. 83. 10 Led 2d 215, 83 S.Ct. 1194, the Supreme Court established:

"The suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The non disclosure of evidence violated Petitioner's due process rights for which the Court of Appeals should have reversed the conviction.

VI CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of Certiorari should be granted

RESPECTFULLY SUBMITTED,

At Ponce, Puerto Rico, June 27, 1992.

JUAN LUIS BOSCIO
Pro-se

APPENDIX

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APPENDIX I

United States Court of Appeals
For the First Circuit

No. 88-2235

UNITED STATES OF AMERICA,

Appellee,

v.

JOSE TORMOS-VEGA,
Defendant, Appellant.

No. 89-1253
No. 89-2022

UNITED STATES OF AMERICA,
Appellee,

v.

JUAN LUIS BOSCIO,
Defendant, Appellant.

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Carmen C. Cerezo, U.S. District Judge]

Before
Breyer, Chief Judge,
Campbell and Selya, Circuit Judges.

Harry Anduze Montano with whom Pia Gallegos was on brief for appellant Jose Tormos-Vega.
Ricardo R. Pesquera, Assistant United States Attorney, with whom Daniel Lopez-Romo, United States Attorney, was on brief for appellee United States.
Juan Luis Boscio on brief pro se.

January 21, 1992

CAMPBELL, Circuit Judge. At argument before us in April of 1990, the defendants/appellants presented numerous chal- lenges to their district court convictions under the Hobbs Act, 18 U.S.C. § 1951. On September 5, 1990, without considering any of the other claims of error, we issued an order granting new trials because the jury had been empaneled by a magistrate, not an Article III judge. We stayed our mandate, however, because of the Supreme Court's grant of certiorari in two cases raising relevant refinements of the magistrate empanelment issue. See *United States v. France*, 111 S. Ct. 805 (1991); *Peretz v. United States*, 111 S. Ct. 2661 (1991). On September 19, 1991, pursuant to the Court's Peretz decision, we withdrew our order of September 5, 1990 granting a new trial. We proceed now to consider and decide the other claims of error previously briefed and argued by the defendants. Finding no reversible error, we affirm both convictions.

I

On October 31, 1985, a federal grand jury returned a three-count indictment against Jose Tormos Vega, the mayor of Ponce, Puerto Rico; Juan Luis Boscio, the president of the board of directors of the Ponce Municipal Development Authority (PMDA); and Miguel A. Serrano, a senior vice president of Shearson American Express Puerto Rico (Shearson). Count One charged that the three defendants,

together with Irding Chardon de Tormos (Tormos Vega's wife) and other parties, had conspired to obstruct, delay and affect commerce by extortion under color of official right, in violation of 18 U.S.C. § 1951. Count One alleged that the conspiracy occurred from on or about June 6, 1983 to on or about August 29, 1983, and that "[i]t was part of said conspiracy that Tormos Vega and Boscio would obtain and did obtain [$110,000] each . . . which was induced by extortion under color of official right." Count One further alleged that "[t]his payment would ensure that Serrano would retain the account of PMDA at Shearson" and that "it was part of said conspiracy that defendant [Serrano] would and did obtain a [$660,000] payment from the account of PMDA at Shearson." Count Two charged that defendants Tormos Vega and Boscio had wrongfully obtained $120,000 from Serrano under color of official right, and Count Three charged that defendant Boscio had wrongfully obtained $100,000 from Serrano, both in violation of 18 U.S.C. § 1951(b)(2) and affecting commerce under § 1951(b)(3).

Prior to the return of the indictment, Serrano, under a grant of immunity, had testified about the incidents alleged in the indictment before the Puerto Rico House of Representatives. Finding that the government had improperly used Serrano's immunized testimony against him, the court dismissed the indictment as against Serrano. The case against Tormos Vega and Boscio was tried beginning on May 27, 1988.

Serrano testified that, in April or May 1983, he was under pressure from his superiors at Shearson[1] to sell several mortgages that had recently been purchased by Shearson. Serrano decided to try to sell the mortgages to the PMDA. Serrano called Boscio and proposed that PMDA purchase the mortgages together with other Shearson financial products it had already agreed to purchase, for a

total price of $66 million. Boscio asked "how much is in it for me?", and Serrano responded that, if Serrano were awarded a 1% commission ($660,000), he would pay Boscio and Tormos Vega $110,000 each, keep $110,000 for himself, and use the remaining $330,000 to pay taxes.

On June 6, 1983, before he had received any money from Serrano, Boscio stated to Serrano "the mayor wants his money now. He needs it now and he wants to see it." Although he initially responded that he could not pay because he had not yet received his $660,000 commission, Serrano wrote a check for $120,000 on his personal account with Shearson, and sent that check to a bank called Home Federal Savings and Loan (Home Federal). Serrano intended that $110,000 go to Tormos Vega to fulfill the original agreement, and that the remaining $10,000 go to Boscio in partial fulfillment of the agreement. Serrano called Jaime Newton Davila, Home Federal's president, instructing him to cash the check and give 120 money orders for $1,000 each to Boscio. Davila testified that he complied with these instructions and gave Boscio 120 blank money orders.

The following day (June 7, 1983), according to Serrano's testimony, a meeting was held in the Condado Holiday Inn, in San Juan. Present were Serrano, Boscio, Davila, Augusto Zayas Cintron, executive director of the PMDA, and other representatives of Shearson. Tormos Vega was not present. At that meeting Serrano drafted two letters on PMDA stationery. The first, addressed to Serrano, stated that "as per [the mayor's] instructions" Serrano was to debit $660,000 from PMDA's account with Shearson and credit that amount to Home Federal's account with Shearson. The second, addressed to Davila, instructed Home Federal to transfer the funds from its Shearson account to an ac-

1. Serrano had requested a leave of absence from Shearson, but the evidence at trial did not clearly establish whether Serrano continued to serve as an officer of Shearson during the relevant time period.

count maintained at Home Federal by Ponce Developers, a corporation controlled by Serrano. After Serrano draftedthe letters, Zayas signed them both.

After the funds were deposited into Ponce Developers' account, Boscio visited Serrano's offices and requested an invoice in order to justify the $660,000 transaction on PMDA's books. Serrano prepared an invoice and gave it to Boscio. A week later Serrano instructed Home Federal to debit his account $600,000, transfer $500,000 to another bank, and issue him a certificate of deposit for $100,000.

Thus, according to Serrano's testimony, the transaction had proceeded smoothly up to this point. However, between June 17 and 19, 1983 Shearson received a letter from Tormos Vega purporting to revoke his authorization of the entire $66 million transaction. Believing that Boscio had not given Tormos Vega the $110,000, Serrano called Boscio. Boscio responded that he would "talk to the mayor and fix everything up." Serrano decided to withhold Boscio's $100,000, sent a note to the mayor reminding him of the agreement, and then went to Tormos Vega's home to ask for an explanation. Tormos Vega told Serrano that he had sent the letter in order to exert pressure on Shearson to approve another pending transaction with the city. Serrano did not ask Tormos Vega whether he had received the $110,000, believing that the mayor would be embarrassed by such a question. Shortly after this meeting between Tormos Vega and Serrano, Tormos Vega and a Shearson official signed an agreement wherein Tormos Vega ratified the $66 million transaction. The transaction having been successfully completed, Serrano again telephoned Davila at Home Federal and instructed over 100 money orders for $1,000 each to Boscio, which Boscio in turn picked up.

About a year later the Treasury Department and the House

of Representatives of Puerto Rico began investigating transactions between the government of Ponce and Shearson. Around September 7, 1984, Serrano, then staying at his parents' house in Florida, received a call from Boscio. Boscio stated that he was also in Florida, at Tormos Vega's home there, and that he and Tormos Vega would like to meet with Serrano. The three met later that day at a shopping mall in Orlando, and both Tormos Vega and Boscio suggested to Serrano ways they might cover up the payments to Tormos Vega. They suggested either simulating jewelry sales or having Tormos Vega sign notes of indebtedness to Serrano so that the payments would appear to be a loan. Serrano rejected these proposals but agreed to meet with Tormos Vega at the latter's home. At that meeting, on September 11, 1984, Serrano informed Tormos Vega that he had been approached by members of the Puerto Rico House of Representatives offering immunity from prosecution in return for his testimony, and suggested that Tormos Vega also seek immunity from that body. Tormos Vega refused, and, as Serrano left, Tormos Vega handed him photocopies of notes indicating a debt from Tormos Vega to Serrano.

The government presented the testimony of several additional witnesses in an attempt to corroborate Serrano's story. Among these witnesses was Raul Rodriguez, manager of the Banco Popular branch in Ponce Plaza. Rodriguez testified that Tormos Vega called him the morning of June 16, 1983 and asked him to stop by Tormos Vega's home before going to work. When Rodriguez arrived at Tormos Vega's home, Tormos Vega said he had recently sold some land in the Dominican Republic and asked Rodriguez to cash some money orders he had received as payment. Rodriguez agreed, and Tormos Vega handed him a paper bag containing several money orders. When Rodriguez arrived at his office, he found that the bag contained 50 money orders for $1,000 each, none of which had been endorsed.

After several unsuccessful attempts to reach Tormos Vega, Rodriguez, noting that the money orders were payable to the bearer, decided to endorse them with fictitious names. Rodriguez then cashed the checks and delivered a paper bag containing $50,000 in cash to Tormos Vega. Rodriguez informed Tormos Vega that he had endorsed the checks with fictitious names, to which Tormos Vega did not reply. The following day, Tormos Vega again asked Rodriguez to come to his home before work. Rodriguez was given a paper bag containing 25 money orders for $1,000 each, all of which had previously been endorsed. Rodriguez cashed these money orders and gave Tormos Vega's son a paper bag containing $25,000 cash. Further testimony was presented indicating that Tormos Vega had traveled to Jacksonville, Florida to cash an additional $28,000 in money orders, and that he had given $7,000 in money orders to several associates as loans, making a total of $110,000 in money orders cashed by Tormos Vega.

II.

The defendants allege a number of errors. We consider each allegation in turn, and, finding no reversible error, affirm the convictions.

A. Source of Funds

Boscio makes various arguments based upon his attempts to prove that the money he received from Serrano constituted payment for legal services (Boscio is an attorney) in an unrelated matter. Referred to by the parties as the "Universal Tank transaction," this other matter was allegedly active around the same time that Serrano received the $660,300 commission. Boscio claims that, by the time he received the money orders, Serrano had transferred the $660,000 commission out of Ponce Devel-

opers' account at Home Federal and deposited therein approximately $422,000 in proceeds from the Universal Tank transaction. Furthermore, according to Boscio, Serrano used part of the $660,000 to purchase a certificate of deposit which did not mature until September 15, 1983, three weeks after he received the money orders. Boscio would have us deduce that he was paid out of the proceeds of the Universal Tank transaction, not from Serrano's commission.

Boscio claims that the government interfered with his ability to present evidence as to the source of payments, thereby committing due process and Jencks Act violations. He further claims that the district court erred in denying his motion for a new trial based upon the discovery of new evidence that would allegedly have helped him establish the source of payments.[2] Because the immediate source of the funds used to pay Boscio was not a critical issue, we find no merit in these arguments. See United States v. Bagley, 473 U.S. 667, 682 (Brady

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2. Specifically, Boscio claims that, first, the government violated the doctrine of Brady v. Maryland, 373 U.S. 83 (1963) by failing to turn over certain of Ponce Developer's bank statements and a certificate of deposit purchased by Serrano from Home Federal, which would have helped establish the source of the payments. (The government turned over the statements dated June 30, 1983 and August 31, 1983, but Boscio alleges that page two was missing from the June statement and that the government should have turned over the July statement). Second, the government violated due process of law "by presenting false evidence and perjured testimony," apparently because the government disagreed with Boscio's view of the relevance of the Universal Tank transaction. Third, the government failed to turn over Jencks Act material that would have helped him cross-examine one Rosario Camacho, a Home Federal branch manager, about the movement of funds in and out of the account. (The government claims it did turn over the material.) Fourth, the district court erred in denying a new trial based on newly discovered evidence concerning Camacho's testimony. The motion for a new trial was considered by the district court which, after considering "particularly the transcript of the trial testimony of the government's witness Rosario Camacho," denied the motion.

due process violation occurs only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"); United States v. Izzi, 613 F.2d 1205, 1212 (1st Cir. 1980) ("our approach [to Jencks Act claims] has been to determine whether the defendant has been prejudiced by the government's [negligent] failure to disclose"), United States v. Benavente Gomez, 921 F.2d 378, 382 (1st Cir. 1990) (granting of new trial based on newly discovered evidence committed to sound discretion of district court; new trial should be granted only where new evidence would probably result in acquittal).

The heart of the prosecution was simply that Boscio had "obtained . . . property [from Serrano] . . . under color of official right." Which pocket of Serrano's the money came from was not itself an essential issue. Indeed, the government presented evidence that the first $120,000 payment ($110,000 for Tormos Vega and $10,000 for Boscio) came, not out of the $660,000 commission, but out of Serrano's personal account. The prosecution sought to prove its case by showing that Boscio (1) when presented with Serrano's proposal asked how much wa~ in it for him; (2) agreed with Serrano to approve the deal in return for $110,000; and (3) later received $110,000. The only relevance of the Universal Tank transaction from Boscio's perspective was to bolster his contention that Serrano's real reason for paying him $110,000 was for his legal services in the Universal Tank matter. Only to the degree the source of the funds bolstered the latter contention was it particularly material; assuming the jury believed the funds were paid for the corrupt purpose to which Serrano testified, the precise source was of little consequence.

Even assuming the funds' source had some relevance, Boscio does not explain how the government's alleged withholding of evidence, or the lack of the later discovered evidence, prevented him at trial from presenting this as-

pect of his defense. Nothing prevented Boscio from summonsing bank statements and other evidence material to identify the sources of funds in the various accounts. Being familiar with his own role as attorney and his relationship with Serrano and the others, Boscio was well able himself to know what evidence he wanted and to go after it before or at trial.

B. The Jury Instructions

Both defendants allege errors in the jury instructions. We consider each allegation in turn.

1. Wrongful Use

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). Tormos Vega argues that the court left out a necessary state of mind element in explaining this definition to the jury. The court instructed the jury that, in order to convict, it had to find that the defendants made "wrongful use of their offices," and that such wrongful use would exist if the defendants used their offices to "obtain[ ] property from a person to which [they had] no lawful claim." Tormos Vega argues that this instruction was error because it required only that he not have a claim to the property, without requiring his knowledge that he have no such claim. Acknowledging that he did not object to this instruction, Tormos Vega claims that it constituted "plain error" and can therefore be reviewed as such for the first time on appeal.

Tormos Vega's argument relies entirely on United States v. Sturm, 870 F.2d 769 (1st Cir. 1989), a case in which this court vacated a Hobbs Act conviction for failure properly to instruct the jury on mens rea. In Sturm the defendant's airplane had been repossessed by a bank, but the defendant retained the flight logs. When the bank asked for the flight logs (without which, because of FAA regulations,

the plane' 5 value was lower), the defendant asked for $20,000 in return. In a subsequent Hobbs Act prosecution, the district court charged the jury that "'wrongful . . . means that the Defendant had no lawful right to the property that he sought to obtain.'" Id. at 775. Although there had been no objection to this instruction, this court found plain error, in part because "[b]y making no reference to the defendant's state of mind, this instruction suggested that [the defendant's] mens rea was irrelevant." Id.

However, this particular instruction was not the sole reason we found plain error in Sturm. In addition to giving this "claim to property" instruction, the court read a general charge that "the government is not required to provide, however, evidence that the Defendant knew those intentional acts were themselves illegal." Id. This court was concerned that this charge, when considered in conjunction with the "claim to property" instruction, might lead the jury to believe that criminal intent was not required. Moreover, the jury instructions had omitted any general reference whatever to criminal intent. We, therefore, specifically distinguished an earlier case where a district court had given a similar "claim to property" instruction but made clear, in a separate part of the instruction, that criminal intent was required. See id. at n.7 (noting that, in United States v. Kattar, 840 F.2d 118, 124 n.4 (lst Cir. 1988), the jury was instructed that "it would have to find that the defendant intended 'to do something forbidden by [the] law.' (Citations omitted). There was no comparable jury instruction in this case.") Cf. United States v. Boylan, 898 F.2d 230 (lst Cir. 1990) (rejecting a mens rea challenge to a Hobbs Act instruction because the court gave a general instruction defining "knowingly" and "willfully" and then used those terms in its wrongfulness instruction). Noting the cumulative effect of all three of these problems, we found plain error in the jury instructions because they would have permitted the jury to convict even if it "found

credible [the defendant claim that he sincerely believed that he was legally entitled to [the property]." Sturm, 870 F.2d at 775.

Although the "claim to property" instruction in Sturm was similar to that given in this case, we hold that, because of differences in both the facts and the other portions of the jury instructions, plain error did not occur here. Jury instructions are to be considered "in the context of the charge as a whole, not in isolation." United States v. Boylan, 898 F.2d 230, 244 (lst Cir. 1990); United States v. Cintolo, 818 F.2d 980, 1003 (lst Cir. 1987). In this case, although the specific "claim to property" instruction was similar to that in Sturm, the charge as a whole did not convey the sense that no criminal intent was required. In fact, the district court gave a general charge, similar to that given in Kattar, that "the government must proof [sic] that the defendants knowingly did an act which the law forbids, and that they purposely intended to violate the law." Moreover, unlike the Sturm court, the district court here did not give a general instruction on ignorance of the law which could have led the jury to believe that no criminal intent was required.

The facts of this case, of course, differ dramatically from those in Sturm. In Sturm, because the defendant had once owned, and possibly still owned, the property at issue, he might genuinely have believed that he was entitled to withhold and bargain with the property at issue. Lacking an appropriate mens rea instruction, the jury might have convicted even though finding Sturm to have lacked criminal intent. No similar risk appears here. Tormos Vega was not paid in return for some piece of property he had once owned and might have thought he still had a claim to. Instead, he was paid for his official approval of a municipal contract after he had demanded some form of reimbursement. The money changed hands in the form of money orders of small denominations and was converted into cash

using fictitious names. Tormos Vega does not point to any evidence from which the jury could have concluded that he thought he was entitled to the money; indeed, evidence was presented that Tormos Vega later suggested ways of covering up the transaction. Given these circumstances, and given the reference to mens rea in the charge as a whole, we do not think the failure to mention mens rea in the wrongfulness instruction constituted "plain error."[3]

2. Active Inducement

Tormos Vega contends that the district court erred because it refused to give a requested jury instruction concerning "inducement" under the Hobbs Act. This argument rests on rec nt cases holding that the Hobbs Act preserves the distinction between extortion and bribery. Before 1984 it was generally accepted that a Hobbs Act conviction of a government official required only proof that the payee accepted funds knowing that the payment was made for the purpose of influencing the payee's actions. However, in 1984 the Second Circuit held, en banc, that "some affirmative act of inducement by the official had to be shown to prove the Government's case." See McCormick v. United States, 111 S. Ct. 1807, 1813 n.5 (1991) (discussing United States v. O'Grady, 742 F.2d 682 (2d Cir. 1982) (en banc) and noting conflict among circuits).

This circuit has yet to pass on the O'Grady analysis, since district judges in this circuit, in cases so far reviewed, have all tended to shape their jury instructions in accordance with the active inducement theory endorsed in O'Grady.

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3. As we find that the jury instructions adequately pointed out to the jury the mens rea element of the crime, we reject Boscio's related argument that the court erred in refusing to give his requested instruction to this effect. The instruction requested by Boscio was substantially covered by the charge given. See United States v. Perkins, 926 F.2d 1271, 1283 (1st Cir. 1983) (no reversible error if requested charge substantially covered by charge given).

See United States v. Boylan, 898 F.2d 230, 252 (1st Cir. 1990); United States v. Jarabeck, 726 F.2d 889, 904 n.16 (1st Cir. 1984). That was true of the charge here also. While the district court refused to give Tormos Vega'sparticular variant of the O'Grady charge, its own instructions were consistent with the central premise of O'Grady.[4]

Tormos Vega's requested the following instruction:

> If you find that Mr. Tormos did not induced [sic], solicited [sic], or in any way requested [sic] from Mr. Serrano any payment in order to wrongfully use his position as mayor then you must find Mr. Tormos not guilty.

While declining this, the district court charged instead as follows:

> the government must proof [sic] . . . . that the defendants knowingly and willfully induced or attempted to induce their victim to part with Property. . . .The mere acceptance of money by a public official is not sufficient to convict him of the crime

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4. It is worth pointing out that the O'Grady court was concerned with a situation far different from that at issue here. In O'Grady, a New York City official had received numerous "meals, trips and other entertainment" from vendors seeking to do business with his agency. 742 F.2d at 685. There was evidence that these benefits were conferred on the defendant as part of the vendors' routine "company policy to entertain customers," and that their cost was deducted from the vendors' taxable income. Id. The court was concerned that a conviction in that case, without a clear showing that the public official used his office to induce the benefits, would turn the Hobbs Act into "'a code of integrity for public officials.'" Id. at 694 (citation omitted). Needless to say, the facts here are far different. Instead of routinely receiving certain gifts, Tormos Vega and Boscio were alleged to have received $220,000 cash in return for their approval of a specific transaction.

> of extortion under color of official right. Mere acceptance of money by a public official is not sufficient to convict him of the crime of extortion under color of official right.
>
> In order to establish the commission of the crime of extortion under color of official right the government must proof tsic] beyond a reasonable doubt that the defendants made wrongful use of their offices in such a way as to induce payments of $110,000 to each of them by Miguel Serrano Arreche. It is a wrongful use of an otherwise valid power that converts dutiful action into extortion.
>
> Extortion under color of official right occurs when a public official through the wrongful use of his office obtains property that is not due to him or his office.

This charge plainly told the jury that to convict it had to find that defendants, including Tormos Vega, knowingly and willfully induced or attempted to induce Serrano to give them money. Its message was little different from the proposed charge. See United States v. Perkins, 926 F.2d 1271, 1283 (lst Cir. 1991) (no reversible error if requested charge substantially covered by charge given). The only differences between this charge and the one requested by Tormos Vega are that the former put the proposition in the positive (stating that the defendants could be convicted on certain findings), instead of in the negative (stating that they could not be convicted on the opposite findings), and that it omitted the terms "solicit" and "request, relying entirely on the term "induce." We think these differences did not alter its basic message.

Tormos Vega argues that alternative verbs such as "solicit" and "request" were needed to flesh out "induce" - a

more colorless term not generally used in common speech. "Induce," however, is the term Congress used in defining Hobbs Act extortion. 18 U.S.C. § 1951(b)(2). We believe that a reasonable jury would understand the meaning of that term as used in the instruction, especially since the court also emphasized that "mere acceptance" was not enough.

Tormos Vega also argues that the court gave a conflicting charge, when it later stated, in the last paragraph quoted above, that "extortion . . . occurs when a public official through the wrongful use of his office obtains property." (Emphasis added). Tormos Vega contends that someone can "obtain" property passively and without any effort, so that this portion of the charge would allow the jury to convict even if it did not find active inducement by Tormos Vega. We disagree. The term "obtain" means "to gain or attain possession or disposal of [usually] by some planned action or method." Webster's Third New International Dictionary (1971). Thus, the term may in fact suggest some planned action on the part of the obtainer. Here, moreover, the term was used only after the court had stated both that "mere acceptance" was not enough and that "inducement" was required. We accordingly reject Tormos Vega's argument.

3. Interstate Commerce

Tormos Vega contends that the court erred in its jury charge on the interstate commerce element of the Hobbs Act. The Act requires a finding, beyond a reasonable doubt, that the defendant "in any way or degree obstructs, delays, or affects commerce." 18 U.S.C. § 1951. The district court instructed the jury that

> [t]he government must show beyond a reasonable doubt that interstate commerce was delayed, obstructed or affected in any way or degree by the acts charged in the indictment. . . .

> The presence of interstate commerce is one of the elements of the offenses charged in the indictment. The element is satisfied if you find beyond a reasonable doubt (1) that the [PMDA, Shearson or Home Federal] at the times relevant to the case were corporations engaged in interstate commerce, and (2) that the transaction between these entities took place as charged in the indictment. It is not necessary, members of the jury, for the government to show that the defendants actually intended to delay, to obstruct, or to affect interstate commerce. Nor is it of any consequence if the defendants were totally ignorant of any effect which the alleged extortion had on interstate commerce.
>
> Therefore, the government need not show that Mr. Tormos and Boscio set out with a specific conscious purpose or a desire to obstruct, to delay, or to affect commerce. It is only necessary for the government to prove that the defendants, Tormos and Boscio embarked on a course of behavior likely to have a natural effect on commerce. (emphasis added).

Tormos Vega protests the second paragraph of this instruction, as it permits the jury to convict merely if PMDA, Shearson or Home Federal were found to have engaged in interstate commerce and if the transactions between them "took place as charged in the indictment." Pointing out that the issue was not simply whether Shearson or PMDA were engaged in interstate commerce, Tormos Vega argues that the jury should have been told to convict only if the allegedly extortionate transaction between individuals (Serrano, Tormos Vega and Boscio) could have affected commerce. See United States v. Jarabeck, 726 F.2d 889, 901 (lst Cir. 1984) (Hobbs Act requires a "'realistic probability that extortionate transaction will have some effect

on interstate commerce") (quoting United States v. DiGregorio, 605 F.2d 1184, 1190 (lst Cir.), cert. denied, 444 U.S. 937 (1979)) (quoting United States v. Hathaway, 534 F.2d 386, 396, (lst Cir.), cert. denied, 429 U.S. 819 (1975)) (emphasis added). Although the individuals allegedly involved in the extortion were affiliated with PMDA, Shearson and Home Federal, the extortionate transaction took place between individuals, not those entities. Thus, the charge's reference to "the transaction between these entities" was misplaced. Moreover, Tormos Vega claims that an extortionate transaction involving parties affiliated with entities engaging in commerce does not necessarily affect commerce. See United States v. Lewis, 671 F.2d 1025 (7th Cir. 1982) (extortion of employee of corporation engaging in interstate commerce had no effect on such commerce).

We agree with Tormos Vega that the mentioned language in the second paragraph above did not, standing alone, sufficiently convey to the jury, as it should have, that the extortion itself had to affect commerce. Jury instructions, however, are to be considered "in the context of the charge as a whole, not in isolation." United States v. Boylan, 898 F.2d 230, 244 (lst Cir. 1990); United States v. Cintolo, 818 F.2d 980, 1003 (lst Cir. 1987). The court charged in the preceding paragraph that the government must show beyond a reasonable doubt "that the interstate commerce was delayed, obstructed or affected . . . by the acts charged in the indictment." The court went on to say in the fourth paragraph that the government [must] prove that the defendants, Tormos and Boscio, embarked on a course of behavior likely to have a natural affect on commerce." Thus the court twice indicated to the jury that the extortion itself had to affect commerce.

Moreover, the test the court described in the second paragraph, while theoretically off the mark, was, as a practical matter, consistent with a proper understanding

of the commerce element. The commerce element may be satisfied where "threatened or potential effects ton commerce] never materialize because extortionate demands are met" or where the extortion has a "beneficial effect on interstate commerce." United States v. Mattson, 671 F.2d 1025 (7th Cir. 1982). Thus, the court correctly conveyed that whether the transaction between [PMDA and Shearson . . . took place as charged in the indictment" was of key significance. The transaction set out in the indictment between Shearson and PMDA was a $66 million transaction between a division of a multi-national investment firm and a municipal government in Puerto Rico. To find this transaction "took place as charged," the jury had to find that it occurred only because Serrano acquiesced in defendants' extortionate demands. Such a finding pointed inexorably to the conclusion that the extortion affected commerce: it facilitated a multi-million dollar transaction which plainly had an effect on interstate commerce.[5] Thus the matters described by the court were, as a practical matter, central to a proper evaluation of the interstate commerce element of the offense. For that reason, and because the charge before and after did, in fact, focus the jury's attention on the requirement that the extortionate transaction between individuals must affect commerce, we hold that the challenged remarks did not constitute reversible error.

4. Conspiracy

Tormos Vega argues that the district court erred in instructing the jury that the defendants were charged with conspiracy under the general conspiracy statute, 18 U.S.C. § 371, rather than the Hobbs Act, 18 U.S.C. § 1951. The

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5. As there was ample evidence that this in fact occurred, we reject Tormos Vega's argument that there was insufficient evidence for the jury to find that the commerce element was satisfied.

indictment charged the defendants with conspiracy to "obstruct, delay and affect commerce . . . in violation of Title 18, United States Code, Section 1951." At the beginning of the jury charge, the court made an introductory statement that "the United States has charged the defendants with one count of conspiring to obstruct, delay and affect commerce by means of extortion under color of official right. " substantially tracking the language of 18 §1951.[6] However, when the court later read a detailed charge on the conspiracy count, it stated that the statute that is relevant for the conspiracy count . . . is Section 371 of Title 18 of the United States Code, which provides in part as follows:

> If two or more persons conspire to commit any offense against the United States, and one or more of such persons does any act to effect the object of the conspiracy, each is guilty of an offense against the United States.

The court went on to explain in detail the elements of 18 U.S.C. § 371, including the requirement that the defendants commit an overt act.

Tormos Vega did not object to this instruction, but claims that it constituted plain error which may be noticed for the first time on appeal. This is a difficult standard to meet: "the plain error exception is only to prevent justice from miscarrying." United States v. Hunnewell, 891 F.2d 955, 956 (quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)). See also United States v. Young, 470

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6. The Hobbs Act provides that "[w]hoever in any way or degree obstructs, delays or affects commerce . . . by robbery or extortion or attempts or conspires so to do" is guilty of a crime. 18 U.S.C. § 1951.

U.S. 1, 16 (1985) (plain errors are those which "undermine the fundamental fairness of the trial").

In support of his argument, Tormos Vega points to United States v. Aquon, 851 F.2d 1158 (9th Cir. 1988) (en banc). In Aguon, the defendant had been charged with conspiracy to commit extortion under 18 U.S.C. § 1951 as well as mail fraud and conspiracy to obstruct justice. The district court gave a general conspiracy instruction under 18 U.S.C. § 371 which allowed the jury to convict for conspiracy to commit extortion or mail fraud, or to obstruct justice, if the elements of § 371 were satisfied. Although the dofendant had not objected to the instruction at trial, the court found the instruction to be plain error for two reasons. First, conspiracy to obstruct justice and conspiracy to commit mail fraud were treated as identical with conspiracy to extort, as though all three crimes of conspiracy were offenses under 18 §371." 851 F.2d at 1169. The latter was not the case, of course, as conspiracy to extort is a crime under § 1951, but the statutes defining mail fraud and obstruction of justice do not contain individual conspiracy provisions, and conspiracy to commit these offenses is only a crime under § 371. Second, the court was concerned that the conspiracy conviction may have been tainted by a potential "spillover" from the district court's erroneous instruction with respect to the substantive extortion count. Those instructions had omitted the mens rea element. Thus, the jury may have convicted on the extortion count without finding the requisite criminal intent, and "concluded that the extortion . . . was evidence of [the defendant's] participation in the conspiracy, even though it may not have been convinced of criminal intent on either charge. Id.

Neither of these two problems is present in this case. First, there is no potential "spillover, as the extortion instructions themselves were correct. see supra. Second, unlike Aquon, extortion was the only substantive crime charged.

Thus, there was no risk here that the jury would confuse conspiracy to commit extortion, a specific crime defined at 18 U.S.C. § 1951, with a general conspiracy under 18 U.S.C. § 371 to commit some other offense. To be sure, the district court erred, technically, in referring to § 371, but we do not think that error "undermined the fundamental fairness of the trial." Young, 470 U.S. at 16. Tormos Vega does not explain how a conspiracy instruction given pursuant to § 1951 would have differed from setting forth the elements of extortion under § 1951 and then giving a general conspiracy charge under § 371, as was done here. Indeed, the only difference that we can discern is favorable to Tormos Vega; § 1951 does not require proof of an overt act in furtherance of the conspiracy, see Ladner v. United States, 168 F.2d 771 (5th Cir.), cert. denied, 335 U.S. 827 (1948), whereas § 371 - and the district court's instructions in this case - do require proof of an overt act.

C. Variance

Both Tormos Vega and Boscio argue that the evidence presented at trial unlawfully varied from the facts alleged in the indictment.

"Variance occurs when the facts proved at trial are different than those alleged in the indictment." United States v. Flaherty, 668 F.2d 566, 582 (lst Cir. 1981). However, the mere fact of variance is not around for reversal; in order to revarse a conviction, a court must find that the variance affected the defendant's substantial rights." Berger v. United States, 295 U.S. 78, 82 (1935). The "substantial rights protected by this rule are that the defendant have sufficient knowledge of the charge against him in order to prepare an effective defense and avoid surprise at trial, and to prevent a second prosecution for the same offense. Id. The doctrine of variance also protects against prejudicial "spillover", so that in cases with multiple defendants proof that one defendant was involved in one conspiracy does not lead the jury to believe that another

defendant was involved in a separate conspiracy. Flaherty, 668 F.2d at 582 (citing United States v. Toliver, 541 F.2d 958, 962-63 (2d Cir. 1976).

Tormos Vega's first claim of variance concerns the evidence of the meeting between Tormos Vega, Boscio and Serrano in Florida, at which they discussed covering up the earlier transactions. When Serrano began to testify about the meeting, Tormos Vega's counsel objected on the ground that evidence of the meeting tended to show another conspiracy - to cover up the earlier transaction - that had not been alleged in the indictment. After hearing Serrano's testimony outside of the presence of the jury and considering the argument, the court ruled that the evidence was directly relevant to the charge that Tormos Vega had participated in the original conspiracy. The court therefore allowed the evidence for that limited purpose. When Serrano later mentioned the term "conspire" in describing the meeting, the court instructed the jury that "the characterization made by Mr. Serrano that 'we are conspiring' is stricken from the record and it is not to be taken by you in any way. . . . [H]is statements as to that meeting, if they are considered by you in any way, shall be considered only with reference to the events of June through August 1983, which are alleged. I repeat, there is no evidence and no charge of any conspiracy in September '84."

Under these circumstances, admission of this evidence clearly did not constitute a variance. That Tormos Vega met with Boscio and Serrano to cover up the original transaction confirmed Tormos Vega's participation in that earlier event as charged in the indictment. If he had not participated, he would have had little reason to try to cover it up. Admitted as further evidence of the occurrence of acts alleged in the indictment, the evidence did not amount to a variance.

We add that even if the admission of this evidence is

regarded as a variance, it would not have affected Tormos Vega's substantial rights. Tormos Vega does not claim that he was surprised by Serrano's testimony concerning the Florida meeting. The government had indicated in a pretrial memorandum submitted to the district court that it would present this evidence. When the evidence was ultimately presented, Tormos Vega did not object on the grounds of surprise; on the contrary, the record indicates that he was prepared to confront it. Moreover, the jury was specifically instructed not to consider this evidence as probative of a second conspiracy. The clarification obviated any improper "spillover" or risk of subsequent prosecution for the same offense.[7]

Tormos Vega's second variance argument is that the means of the extortion proven at trial were different from those alleged in the indictment. Tormos Vega claims the indictment alleged that he demanded money from Serrano in order to "ensure" that PMDA's account would remain at Shearson, but that the evidence at trial showed that the reason Serrano paid him the money was in order to ensure that Serrano received a commission for himself.

Tormos Vega's argument only applies to Count One of the indictment, the conspiracy count. Count Two of the indictment, which charges Tormos Vega with extortion, does not mention Serrano's reason for making the payment. Count One, charging conspiracy, reads in relevant part as follows:

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7. We also reject Tormos Vega's argument to the extent it is based on the Federal Rules of Evidence. The evidence was highly probative, and its probative value would not have been "substantially outweighed" by any prejudice. see Fed. R. Evid. 403.

> the defendants . . . conspired . . . to obstruct, delay and affect commerce . . . by extortion under color of official right, as that term is defined in Section 1951 of Title 18, United States Code.
>
> 3. It was part of said conspiracy that defendants JOSE TORMOS VEGA and JUAN LUIS BOSCIO would obtain and did obtain [$110,000 each] which was induced by extortion under color of official right. This payment would ensure that MIGUEL A. SERRANO Senior Vice President of Shearson would retain the account of PMDA at [Shearson.]
>
> 4. It was part of said conspiracy that defendant MIGUEL A. SERRANO would and did obtain a [$660,000] payment from the account of PMDA at [Shearson].

Count One continued with a section entitled "Overt Acts" which discussed in more detail how the alleged extortion was carried out. This section contained several references to Serrano's $660,000 commission.

For Tormos Vega's argument to succeed, we would have to find that the conspiracy count alleges that the only reason for Serrano's payment was his desire to retain the PMDA account at Shearson, and that Serrano's self-interested desire to receive a commission personally was not also alleged as a reason for the payment. The indictment, obviously, does not support such a construction. To be sure, in mentioning the retention of the PMDA account, the indictment stated that the extortion payment would "ensure" that Serrano "retain" that account. But the conspiracy count also mentioned the $660,000 commission, alleging "it was part of said conspiracy" that Serrano would and did obtain the commission. Moreover, the $660,000 payment was referred to repeatedly in the part of Count One

listing overt acts in furtherance of the conspiracy. There was plainly no variance.

Indeed, even assuming a variance, there was no infringement of Tormos Vega's substantial rights. The indictment repeatedly mentioned the commission, and Tormos Vega could not possibly have been surprised by evidence that he had used Serrano's desire to obtain a commission in order to extort money from him.[8]

D. **Sufficiency of the Evidence**

Tormos Vega challenges the sufficiency of the evidence on two grounds. He claims that there was insufficient evidence (1) to show that he induced Serrano to pay the $110,000, and (2) to show that he agreed to enter into a conspiracy.

The standard of review for a sufficiency of the evidence claim is "'whether, taken as a whole and viewed in the light most favorable to the government, the evidence and all legitimate inferences therefrom would allow a rational trier of fact to find guilt beyond a reasonable doubt.'"

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8. Tormos Vega's reliance on United States v. Cusmano, 659 F.2d 714 (6th Cir. 1981), is misplaced. In Cusmano, a Hobbs Act prosecution, the indictment had alleged that the means of the extortion was to induce fear of economic loss. The court reversed the conviction because the evidence and jury charge amounted to an amendment of the indictment, permitting the jury to convict if it found that the means of the extortion was to induce fear of physical violence. Although amendment of an indictment, unlike factual variance, requires per se reversal, United States v. Baytank (Houston), Inc., 934 F.2d 599, 606 (5th Cir. 1991), Cusmano found an amendment only because the court's jury charge would have permitted conviction on a fundamentally different basis from that alleged in the indictment. Here the jury charge on the conspiracy count mirrored the language of the indictment. See United States v. Iozzi, 420 F.2d 512, 515-16 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971) (rejecting claim of improper amendment because "the court carefully followed the lan- guage of the indictment in charging the jury").

United States v. Molinares Charris, 822 F. 2d 1213, 1218 (lst Cir. 1987), cert. denied, 110 S. Ct. 233 (1989) (quoting United States v. Luciano Pacheco, 794 F. 2d 7, 10 (lst Cir. 1986)). Tormos Vega has not met this standard with respect to either claim.

Assuming, arguendo, that "active inducement" is required by the Hobbs Act, there was sufficient evidence from which the jury could conclude that Tormos Vega had induced a payment from Serrano. The Second Circuit has held that n [p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a quid pro quo would suffice as would other circumstantial evidence tending to show that the public official induced the benefits. n United States v. O'Grady, 742 F.2d 682, 691-62 (2d Cir. 1984). Tormos Vega argues that Serrano could not be seen as having been induced at all, much less by Tormos Vega, as it was Serrano who initially approached Boscio to propose the transaction. However, this argument ignores that Serrano's proposal to pay $110,000 each from his own commission to Boscio and Tormos Vega came only after Boscio had demanded "how much is in it for me?" A rational jury could conclude from this evidence that Boscio's demand induced Serrano to offer to pay $110,000 each to Boscio and Tormos Vega.

The jury could also infer from Tormos Vega's subsequent conduct that Tormos Vega, despite his lack of direct contact with Serrano, had induced his own payments from Serrano through the agency of Boscio. Although there was no evidence directly linking Tormos Vega to Boscio's original demand, Serrano testified that, before he paid any of the money, Boscio told him that "the mayor wants his money now. He wants it now and he needs to see it." Of course, Boscio could have been lying about the mayor's wishes in order to increase his bargaining power, but there was a good deal of other evidence linking Tormos Vega to the transaction. Serrano testified that Tormos Vega met with

him and Boscio in Florida to cover up the transaction, and testimony linking Tormos Vega to tho 110 money orders given to Boscio and showing that fictitious names had been used to cash them. This evidence tended to reinforce the conclusion that Boscio did in fact speak for Tormos Vega when he told Serrano "the mayor wants his money now." Moreover, the evidence showed that Tormos Vega had at one point put a halt to the PMDA's purchase of Shearson's financial products by revoking his approval of the transaction, and that the transaction was finalized only after Tormos Vega signed an agreement with Shearson. The jury could have concluded from this evidence that Tormos Vega's approval was necessary to the transaction, making it more likely that it was his authority, as well as Boscio's, that induced the payments from Serrano. We think that a rational jury could have concluded from this evidence that Tormos Vega had induced Serrano to pay him $110,000.

There was also sufficient evidence to support a conviction on the conspiracy count. Tormos Vega argues that there was no evidence of any agreement between him and Boscio or Serrano. See United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (lst Cir. 1989) ("the sine qua non of a conspiracy is the agreement between the conspirators"). In support of this claim Tormos Vega reiterates his arguments relating to the evidence of inducement, and points to his absence from a critical meeting (at the Condado Holiday Inn to sign various letters) and the fact that he at one point revoked his authorization of the transaction. However, Tormos Vega's arguments ignore that "because of the secretive nature of the crime, it is recognized that the agreement may be express or tacit. . . . [and] may be proven by circumstantial as well as express evidence." Id. See Glasser v. United States, 315 U.S. 60, 80 (1942) ("a common purpose and plan may be inferred from a development and collocation of circumstances"). We think

there was ample evidence from which the jury could have concluded that Tormos Vega agreed with Boscio to extort money from Serrano. Again, that evidence included Boscio's statement that the "Mayor wants his money now" and the evidence that Tormos Vega received the money orders via Boscio. Most importantly, the jury could reasonably have inferred that, as the parties agreed to meet in Florida to cover up the transaction, they had originally agreed to carry out the transaction in the first place.

E. **Double Jeopardy**

Boscio argued in the district court that this prosecution placed him twice in jeopardy for the same offense. The district court rejected this argument, and we affirmed in an interlocutory appeal. United States v. Boscio, No. 87-1103 (lst Cir. Feb. 2, 1988) (unpublished opinion). Since that appeal, the Supreme Court has decided a double jeopardy case, Grady v. Corbin, 110 S. Ct. 2084 (1990), which, Boscio argues, requires that we reverse our prior decision. Although Corbin does govern this appeal, see Griffith v. Kentucky, 479 U.S. 314 (1987) (rules of law announced while a case is pending on direct review apply retroactively to that case), we do not think it changes the result.

Before this trial began, Boscio was charged with mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, and aiding and abetting others in the same offenses in violation of 18 U.S.C. § 2. We summarized the allegations of that indictment in Boscio's earlier appeal.

> Serrano (as Shearson) promised to lend the [PMDA] $3 million dollars [sic].
>
> The [PMDA] would put up $3 million in "FHA" mortgages and "Title One" notes as security. Serrano had the [PMDA] promise to lend Ponce Developers [a corporation controlled by Serrano] $3 million. Ponce Developers would put up $3 million in the

> same "FHA" mortgages and "Title One" notes as security. Serrano had Ponce Developers promise to give $2 million to [Home Federal]. [Home Federal] would give Ponce Developers $1.7 million in the same mortgages and notes.
>
> The indictment goes on to say that all this was worked out in May 1982. At that time, Shearson actually provided the $3 million. Serrano had Shearson put $2 million in a [PMDA] account and $1 million in a Ponce Developers account. Serrano then falsely told [Home Federal] that the $2 million in the [PMDA] account belonged to Ponce Developer and, on the strength of this lie, [Home Federal] gave Ponce Developers the $1.7 million worth of Federal Housing Act notes and mortgages. Serrano used them as part of the collateral for the Shearson loan to the [PMDA].
>
> The indictment concludes by saying that Serrano sent $3 million through the wires to New York . . . [and that Boscio] helped Serrano throughout.

Boscio at 3. Boscio was convicted of the offense alleged in that indictment.

We noted in Boscio's previous appeal that the only common features" of the transactions giving rise to the fraud and extortion prosecutions were that "the government introduced evidence of the extortion at the appellant's trial for fraud," and "some of the money used to make the extortion payments came from the $1 million [PMDA] account at Shearson set up as part of the fraud." Id at 4-5. We rejected Boscio double jeopardy claim because [t]he conduct allegedly leading up to the extortion is . . . sufficiently different from the conduct making up the fraud so that this evidentiary overlap would not come close to making a double jeopardy claim." Id. at 5.

At the extortion trial, which took place after our decision in the previous appeal, Serrano testified about the million transaction. Serrano stated briefly that it and other

earlier transactions had been "lump[ed] . . . together" with a $47 million transaction to make a total $66 million transaction. When counsel for Tormos Vega sought to cross-examine Serrano concerning this transaction, the district court specifically forbade Serrano to "mention Mr. Boscio at all in any way as having been indicted or convicted in relation to any previous transaction. .

Neither Grady nor Serrano's testimony at trial change our previous decision. To be sure, Grady did expand the reach of the double jeopardy clause, holding that it "bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 110 S. Ct. at 2087. However, the existence of the earlier transaction was not "an essential element" of the extortion offense. Instead, the purpose of the introduction of evidence of that transaction at the extortion trial was merely to provide background information. That evidence merely filled in a gap in the evidence so that the jury could understand how the $66 million transaction came to involve $66 million instead of only $47 million. The essential elements of the extortion were that Boscio induced Serrano to pay money in order to get his and Tormos Vega's approval for the transaction; why that transaction was for $66 million was not essential to the conviction. Boscio has pointed out only an "evidentiary overlap" which does not constitute a double jeopardy violation. See id. at 2093 ("the presentation of specific evidence at one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding").

We have considered the other arguments raised by the defendants and find them to be without merit.

For the reasons stated above, the convictions in numbers 88-2235, 89-1253 and 89-2022 are affirmed.

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APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1253

UNITED STATES,
Appellee,

v.

JUAN LUIS BOSCIO,
Defendant, Appellant.

No. 89-2022

UNITED STATES,
Appellee,

v.

JUAN LUIS BOSCIO,
Defendant, Appellant.

ORDER OF COURT

Entered: January 30, 1992

Upon motion:

Upon consideration of appellant's motion,

It is ordered that the time for appellant to file a petition for rehearing be enlarged to and including February 20, 1992.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-125.3

UNITED STATES,
Appellee,

v.

JUAN LUIS BOSCIO,
Defendant, Appellant.

No. 89-2022

UNITED STATES,
Appellee,

v.

JUAN LUIS BOSCIO,
Defendant, Appellant.

Before

Breyer, Chief Judge,
Campbell, Senior Circuit Judge,
Torruella, Selya and Cyr, Circuit Judges.

ORDER OF COURT

Entered: March 19, 1992

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc hav-

ing been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that a petition for rehearing or a suggestion for rehearing en banc be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Boscio and Pesquera]

APPENDIX IV

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
Plaintiff,

v.

JOSE TORMOS VEGA,
JUAN LUIS BOSCIO,
MIGUEL A. SERRANO
DEFENDANTS

THE GRAND JURY CHARGES:

INDICTMENT
CRIMINAL NO. 85-449 CC
TITLE 18 U.S.C. SECTIONS 1951 and 2

INTRODUCTION

1. At all times material to this Indictment JOSE TORMOS VEGA, a defendant herein, was Mayor of the City of Ponce, Puerto Rico, and in such capacity was entrusted and charged with the powers of said office which included but was not limited to the responsibility of overseeing and approving transactions of the City of Ponce and its entities, including but not limited to the Ponce Municipal Development Authority.

2. The Ponce Municipal Development Authority (PMDA) was created by Ponce Municipal Law #146 dated June 8, 198 Article 20A Section 5, pursuant to Ordinance #61 (1980-81). PMDA was established to create a Housing Development Department within the Municipality of Ponce intended to raise funds for the development of new housing and re-habilitation of existing housing in the City of Ponce. The funding for the aforesaid program was to be obtained through the loan to lender program by Issuance of approximately 30 Million in Ponce Municipal Bonds which were to be sold to investors by Shearson/ American Express of Puerto Rico.

3. Shearson American Express of Puerto Rico (SAEPR), a subsidiary of Shearson American Express Inc. which among other things engages in interstate commerce, was at all times herein doing business with the Municipality of Ponce including but not limited to the Ponce Municipal Development Authority through MIGUEL A. SERRANO, Senior Vice President of Shearson American Express of Puerto Rico.

4. MIGUEL A. SERRANO, at all times material to this indictment, was Senior Vice President of Shearson American Express of Puerto Rico ant was the broker in charge of all accounts at SAEPR belonging to the Municipality of Ponce and its entities including but not limited to the account to SAEPR of the PMDA.

5. Juan Luis Boscio a defendant herein, at all times material to this indictment was President at the Board of Directors of the Ponce Municipal Development Authority and a member of the Municipal Assembly of Ponce.

COUNT ONE

1. Paragraphs one through five of the Introduction are realleged and incorporated herein by reference, as if stated in

full.

2. From on about June 6, 1983 up to on or about August 29, 1983 in the District of Puerto Rico and within the jurisdiction of this Court,

JOSE TORMOS VEGA,
MIGUEL A. SERRANO and
JUAN LUIS BOSCIO

the defendants herein, did unlawfully, willfully and knowingly combined, conspired, confederated and agreed together with each other, and with Irding Chardón de Tormos an unindicted coconspirator, and with other persons known and unknown to the Grand

Jury to obstruct, delay and affect commerce, as that in Section 1951 of Title 18, United States Code, by extortion under color of official right, as that term is defined in Section 1951 of Title 18, United States Code.

3. It was part of said conspiracy that defendants JOSE TORMOS VEGA and JUAN LUIS BOSIO would obtain and did obtain one hundred and ten thousand dollars ($110,000) each for a total of two hundred and twenty thousand dollars ($220,000) which was induced by extortion under color of official right. mis payment would ensure that MIGUEL A. SERRANO, Senior Vice President of SAEPR would retain the account of PMDA AT SAEPR.

4. It was part of said conspiracy that defendant MIGUEL A.SERRANO would and did obtain a six hundred and sixty thousand dollars ($660,000.00) payment from the account of PMDA at SAEPR.

In furtherance of the conspiracy and to effect the objects thereof, the defendant performed the following overt acts:

a. On or about June 6, 1983 MIGUEL A. SERRANO withdrew one hundred and twenty thousand dollars ($120,000) from MIGUEL A. SERRANO dba Ponce De-

velopers Inc. account at SAEPR account number 799-90173.

b. On or about June 6, 1983 Augusto Zayas, former Executive Director, PMDA, was instructed by JUAN LUIS BOSCIO, President of PMDA to appear at the Condado Holiday Inn i San Juan, Puerto Rico on June 7, 1983 to sign some documents per the direct instructions of JOSE TORMOS VEGA, Mayor of the City of Ponce.

c. On or about June 7, 1983 SAEPR check #3607 for one hundred and twenty thousand dollars ($120,000) was cashed at Home Federal Savings and Loan Association of Puerto Rico (HFSL) and exchanged for 120 Home Federal Savings ant Loan money orders of one thousand dollars ($1,000) each.

d. On or about June 7, 1983, Jaime Davila, President of HFSL handed the aforementioned 120 money orders to JUAN LUIS BOSCIO, who retained 10 money orders of one thousand dollars ($1,000) each and hand delivered the remaining 110 money orders of one thousand dollars ($1,000) each to JOSE TORMOS VEGA.

e. On or about June 7, 1983 JUAN LUIS BOSCIO obtained bond paper with the letter head of PMDA which was later delivered to MIGUEL A. SERRANO at the Condado Holiday Inn.

f. On or about June 7, 1983 MIGUEL A. SERRANO drafted two letters for the signature of Augusto Zayas which were typed in the aforementioned bond paper with the leterhead of PMDA.

g. On or about June 7, 1983 Augusto Zayas signed the aforesaid two letters based on instructions received from JUAN LUIS BOSCIO who indicated that JOSE TORMOS VEGA had authorized the transfer of six hundred and sixty thousand dollars ($660,000.00) from the account of PMDA at SAEPR.

h. On or about June 10, 1983 MIGUEL A. SERAANO handed Jaime Davila, President HFSL, Shearson check num-

ber 3637 in the amount of six hundred and sixty thousand dollars ($660,000.00) along with a letter dated June 7, 1983 signed by Augusto Zayas, requesting that the $660,000.00 be credited to the account at HFSL of MIGUEL A. SE-. RRANO dba Ponce Developers Inc.

i. On June 7, 1983 the six hundred and sixty thousand dollars ($660,000.00) were credited to the account of MIGUEL A. SERRANO dba Ponce Developers Inc at HFSL.

j. On or about June 15, 1983 MIGUEL A. SERRANO submitted a false invoice to JOSE TORMOS VEGA in the amount of $660,000.00 for services rendered in relation to a sixty six million dollar ($66,000,000) loan that was obtained for the Municipality of Ponce through SAEPR, MIGUEL A. SERRANO submitted said invoice after having been paid by SAEPR for said services.

k. On June 16, 1983 Raúl Rodríguez received 50 money orders from JOSE TORMOS VEGA.

1. On June 16, 1983 Raúl Rodríguez, Manager, Ponce Plaza Branch of Banco Popular de Puerto Rico cashed 50 money orders filled out with fictitious names and bearing false endorsement signatures for JOSE TORMOS VEGA.

m. On or about June 16, 1983 Irding Chardón de Tormos handed Raúl Rodriguez 25 money orders to be cashed which had been filled out with fictitious names and endorsed with fraudulent signatures.

n. On or about June 17, 1983 Irding Chardón de Tormos handed Raúl Rodríguez 25 money orders to be cashed which had been filled out with fictitious names and endorsed with fraudulent signatures.

o. On or about June 20, 1983 JOSE TORMOS VEGA deposited approximately 25 money orders with fictitious names at the Barnett Bank of Jacksonville, Florida.

p. On June 17, 1983 Raúl Rodríguez, Manager, Ponce Plaza Branch of Banco Popular de Puerto Rico cashed an additional 25 money orders filled out with fictitious names and bearing false endorsement signatures for JOSE TORMOS

VEGA.

q. On or about August 26, 1983 and on or about August 29, 1983 JUAN LUIS BOSCIO received 100 money orders of one thousand dollars ($1,000).

r. The cashing of said money orders filled out with fictitious names and bearing false endorsement signatures would cover up the source of said monies. All in violation of Title 18, United States Code, Section 1951.

COUNT TWO

1. Paragraphs one through five of the Introduction are realleged and incorporated herein by reference, as if stated in full.

2. On or about June 7, 1983, in the District of Puerto Rico, and within the jurisdiction of this Court the defendants, JOSE TORMOS VEGA and JUAN LUIS BOSCIO, the defendants herein, aiding and abetting each other, did unlawfully, knowingly and willfully commit extortion as that term is defined in Section 1951(b)(2), of Title 18, United States Code, that is, the defendants herein did obtain one hundred and twenty thousand dollars ($120,000) from MIGUEL A. SERRANO, in his capacity as Vice President of Shearson American Express, with the consent of MIGUEL A. SERRANO, such consent having been wrongfully obtained under color of official right, as that term is used in Section 1951(b)(2), of Title 18, United States Code, and said extortion did have an effect in commerce, as that term is defined in Section 1951(b)(3), of Title 18, United States Code, all in violation of Title 18, United States Code, Section 1951 and 2.

COUNT THREE

1. Paragraphs one through five of the Introduction are

realleged and incorporated herein by reference, as if stated in full.

2. From on or about August 26, 1983, up to and including August 29, 1983, in the District of Puerto Rico, and within the jurisdiction of this Court JUAN LUIS BOSCIO, the defendant herein, did unlawfully, knowingly and willfully commit extortion, as that term is defined in Section 1951(b)(2), of Title 18, United StatesCode, that is, did obtain $100,000 one hundred thousand dollars)from MIGUEL A. SERRANO, in his capacity as Vice President of Shearson American Express, with the consent of MIGUEL A. SERRANO, such consent having been wrongfully obtained under color of official right, as that term is used in Section 1951(b)(2), of Title 18, United States Code, and said extortion did have an effect in Commerce, as that term is defined in Section 1951(b)(3), of Title 18, United States Code, all in violation of Title 18, United States Code, Section 1951.

TRUE BILL

FOREPERSON

DANIEL F. LOPEZ ROMO
United States Attorney

Lydia Lizarríbal
Assistant U.S. Attorney

DATED: October 31, 1985

NOT TRANSFERABLE EXCEPT ON THE BOOKS OF THE DEPOSITORY INSTITUTION

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION
PONCE, PUERTO RICO

№ 004166

1. ACCOUNT SUMMARY SECTION

Account No. 4166

ACCOUNTHOLDER(S) MIGUEL SERRANO

Date of Issuance 6-17-83

10000 CC

OPENING BALANCE	MINIMUM BALANCE REQUIREMENT	INITIAL MATURITY DATE	RENEWAL TERM	RATE OF EARNINGS PER ANNUM	FREQUENCY OF COMPOUNDING
100000.00	50000.00	9-15-83	none	8.75%	none

EARNINGS DISTRIBUTION DATES BEGINNING 9-15-83 AND 9-15-83

THEREAFTER WITH THE LAST DISTRIBUTION ON THE FINAL MATURITY DATE

2. **GENERAL SECTION** This certifies that the Accountholder holds a savings account with the Opening Balance and for the initial term expiring on the Initial Maturity Date shown hereon in the above named savings institution.

3. **EARNINGS SECTION** This account shall receive earnings at the rate and with the Frequency of Compounding as above set forth. Such earnings shall be payable on the Earnings Distribution Dates above set forth, provided the balance in the account is not reduced below the Minimum Balance Requirement. If such balance is reduced below the Minimum Balance Requirement the Rate of Earnings on the remaining balance shall thereafter be reduced to the rate then paid on regular savings accounts (see also Section 5).

4. **RENEWAL SECTION** This account shall be automatically renewed at the close of business on the Initial Maturity Date or the maturity date of any Renewal Term unless (1) withdrawn within the 7-day period referred to in Section 5 hereof or (2) at least 15 days prior to any such date, the association gives written notice to the Accountholder that this account will not be renewed at the Rate of Earnings and/or for the Renewal Term set forth above. In such latter event, upon maturity the account will either be extended for such additional term and at such rate of earnings as set forth in said notice or the account will be converted to a regular savings account and receive earnings at the rate then paid on regular savings accounts.

5. **PENALTY CLAUSE SECTION** Except as otherwise provided herein, in the event of any withdrawal of principal from this account prior to the initial or renewal period maturity date, the Accountholder shall forfeit an amount equal to three months of the maturity of the account is three months to one year), or six months of the maturity of the account is greater than one year) earnings, whether earned or not, on the amount withdrawn at the nominal (simple interest) rate being paid on the account, regardless of the length of time the funds withdrawn have remained in the account.

The penalty prescribed herein will not be imposed for withdrawal of principal following the death or adjudication of incompetence of any Accountholder.

Any withdrawal which reduces the account balance below the Minimum Balance Requirement, or any change in the term or Rate of Earnings, shall be considered as a withdrawal of the entire account balance and shall be subject to the penalty prescribed herein.

Earnings credited to this account may be withdrawn at any time without penalty.

If the account or any portion thereof is withdrawn not more than 7 days after a maturity date, earnings shall be paid thereon at the Rate of Earnings above set forth to the date of withdrawal without penalty.

To the extent necessary to comply with these requirements, deductions shall be made from the amount withdrawn or the remaining account balance.

- 1983

FSLIC

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION

BY Roberto P. Gandia

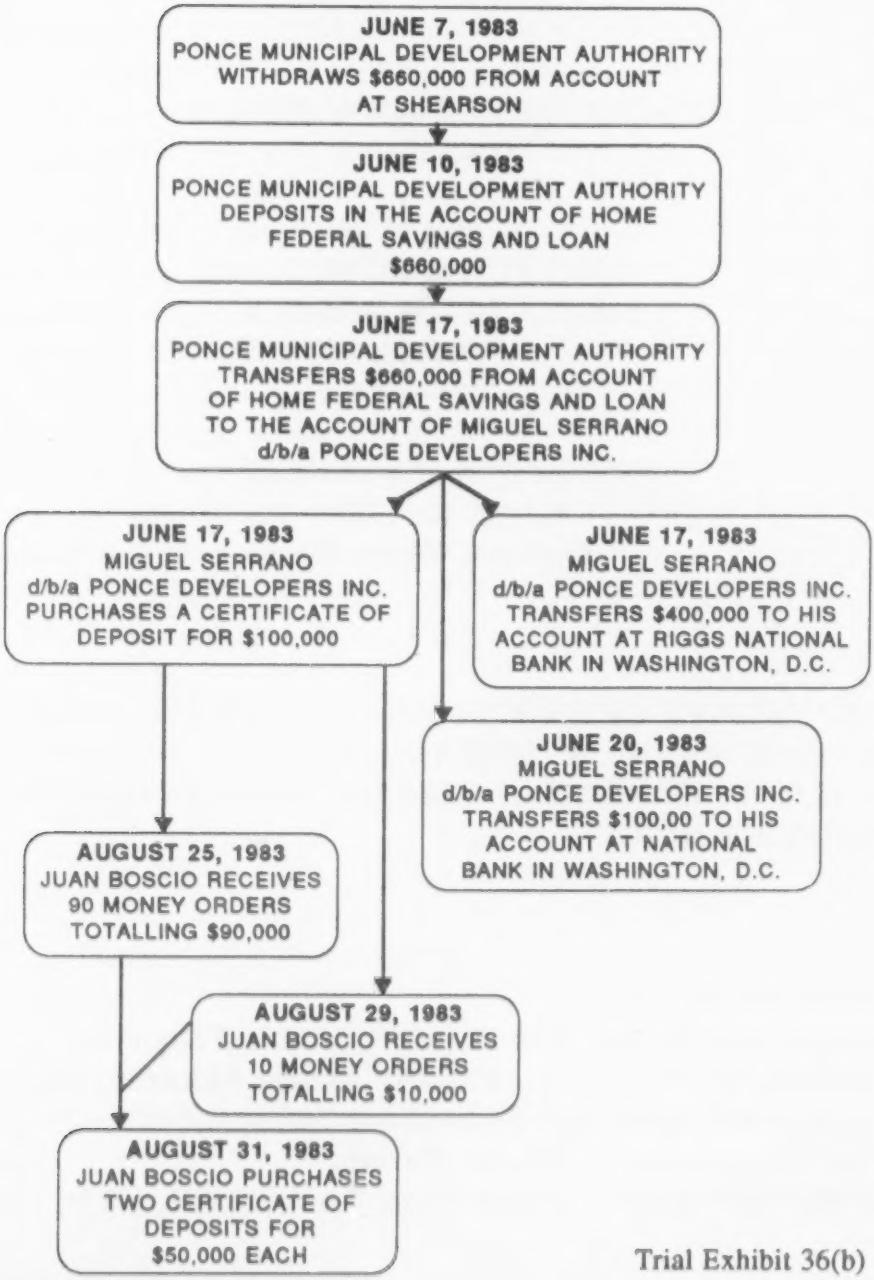
AUTHORIZED SIGNATURE

3 A CD 7-80 S

BEST AVAIL

APPENDIX VI

SOURCE AND DISTRIBUTION OF MONEY RECEIVED BY JUAN BOSCIO AND MIGUEL SERRANO


JUNE 7, 1983
PONCE MUNICIPAL DEVELOPMENT AUTHORITY WITHDRAWS $660,000 FROM ACCOUNT AT SHEARSON
JUNE 10, 1983
PONCE MUNICIPAL DEVELOPMENT AUTHORITY DEPOSITS IN THE ACCOUNT OF HOME FEDERAL SAVINGS AND LOAN $660,000
JUNE 17, 1983
PONCE MUNICIPAL DEVELOPMENT AUTHORITY TRANSFERS $660,000 FROM ACCOUNT OF HOME FEDERAL SAVINGS AND LOAN TO THE ACCOUNT OF MIGUEL SERRANO d/b/a PONCE DEVELOPERS INC.
JUNE 17, 1983
MIGUEL SERRANO d/b/a PONCE DEVELOPERS INC. PURCHASES A CERTIFICATE OF DEPOSIT FOR $100,000
JUNE 17, 1983
MIGUEL SERRANO d/b/a PONCE DEVELOPERS INC. TRANSFERS $400,000 TO HIS ACCOUNT AT RIGGS NATIONAL BANK IN WASHINGTON, D.C.
JUNE 20, 1983
MIGUEL SERRANO d/b/a PONCE DEVELOPERS INC. TRANSFERS $100,00 TO HIS ACCOUNT AT NATIONAL BANK IN WASHINGTON, D.C.
AUGUST 25, 1983
JUAN BOSCIO RECEIVES 90 MONEY ORDERS TOTALLING $90,000
AUGUST 29, 1983
JUAN BOSCIO RECEIVES 10 MONEY ORDERS TOTALLING $10,000
AUGUST 31, 1983
JUAN BOSCIO PURCHASES TWO CERTIFICATE OF DEPOSITS FOR $50,000 EACH

Trial Exhibit 36(b)

ABLE COPY

APPENDIX VII

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA
Plaintiff,
v

JOSE TORMOS VEGA,
and JUAN LUIS BOSCIO,
Defendants.

* Criminal No. 85-449 (CC)
* June 10, 1988
* San Juan, Puerto Rico
*

TRANSCRIPT OF PROCEEDINGS CROSS EXAMINATION OF MIGUEL A. SERRANO BEFORE HONORABLE CARMEN CONSUELO CEREZO, UNITED STATES DISTRICT JUDGE

* * *

APPEARANCES:
Counsel for the plaintiff: AUSA Ricardo Pesquera
Counsel for the defendants: Harry Anduze Montaño, Esq.
Nydia Diaz Buxo, Esq. Rafael Toro Cuberge, Esq.
Court interpreter: Thomas Kavelin
Court reporter: Laurel Mazur

"Question: It was yours?

"Answer: I assume. "Mr. Miguel, why were you willing to reduce or suffer a reduction in your commission of $660,000 which you said corresponds to a legitimate work which you carried out in your normal functions of obtaining money, if that was asserted by you obligated by circumstances, you did it as an investment with the hope of carrying out future transactions with the Municipality of Ponce?

"Answer: Well, I am going to answer that question in two parts, if I am allowed. In the case of Attorney Juan Luis Boscio I paid him the money because ,**I understood that he deserved it because he worked and he worked hard with me**. I go back to what I said before, give to Cesar what is rightfully Cesar's. Really the man worked very hard and he even left his law practice and attended to deal with me about the details and when I had to go to New York he always went with me. He helped me a lot."

A I said that, yes. I did. I did.

Q That is correct.

A But I also said something later after that.

Q Yes, I know. We will get to that.

A Okay.

Q And you mentioned that he worked for you also all the way through your testimony in the "Camara de Representantes, and I am going to address you now to page 104-

MR. PESQUERA: Your Honor, again, I hate to interrupt

but if this is going to be the procedure why don't you introduce the whole transcript and let the jury read it, because if Mr. Toro is just going to point out certain -

MR. ANDUZE: That is an objection. He shouldn't be making arguments before the jury.

(Sidebar discussion:)

THE COURT: Mr. Pesquera, don't do that again.

MR. PESQUERA: I am sorry, but the procedure being followed right now I understand is improper. The proper way is to ask questions. If there is an answer to the question to which he believes there is a different answer, then he impeaches him with that. Or if the witness does not remember something you can refresh the recollection by showing the document. But what Mr. Toro is doing here is he is asking questions. The witness answered, and then he goes and reads the portion which it says basically the same thing that Mr. Serrano has stated. I don't see— and if this is going to be the procedure we might as well enter the whole transcript into evidence.

MS. DIAZ: If I may. When we began this case your Honor called us to the bench and instructed all of us as attorneys that if a situation like this should occur that we should come to the bench and not make it in front of the jury.

MR. PESQUERA: That was an outburst on my part and I apologize to the Court and to my Brother Counsel.
MR. TORO: The thing is, your Honor, I have to convey to the jury that Mr. Boscio worked for his money.

THE COURT: What he is saying is that if you ask him if you know that he has said in the past that he paid because

he deserved to be paid for his work, you should just directly ask him, "Did you pay him because you thought he deserved to be paid?" If he says no, then you confront him instead of duplicating.

MR. TORO: I know.

THE COURT: All right. Objection sustained.

(In open court:)

BY MR. TORO:

Q The truth of the matter is, Mr. Serrano, that Mr. Boscio worked hard for his money, didn't he?

A That is correct.

Q That is correct. Now, when— going now to Florida, the Florida Festival, did Mr. Boscio in any way tell you that he wanted to cover up the money that he had received?

A You see, he didn't utilize the word "cover-up," but the conversation was in relation to covering up. But he didn't use the word "cover-up." How can I explain it? "Let's say it was a loan to the mayor," for example, but he didn't use the word "cover-up." That is what I am traying to— okay.

Q He never mentioned - did you ever mention the word "cover-up" for him?

A The word "cover-up"?

Q Yes.

A No. But the act of committing a cover-up, that is

what was done. That is what was being said.

Q I am going to read you page 251 of the testimony you gave in the "Camara de Representantes."

"Question: Or in a later date would you have required some intermediate endorsement?

A "That's right, or some transfer."

Q "I ask you whether Mr. Juan Luis Boscio also proposed some plan to cover-up the payment of the commission to him, the payment of the $110,000 that he received." Your answer, "No."

A Mr. Cuberge, excuse me a second. I want to clarify something. I thought you were talking about Tormos Vega. I thought you were talking about Tormos Vega.

Q No, I am talking about Mr. Boscio.

A I am sorry.

Q That's all right. Well, I am going to repeat it again so that you unconfuse yourself.

A Well, it's just that - it's such a similar thing.

MR. PESQUERA: Let the attorney ask the question and if the answer differs to what appears there then use the deposition.

MR. TORO: Well, he just answered, your Honor, that he was mentioning Mr. Boscio in the cover-up and I was refreshing his recollection.

THE COURT: All right. Go ahead. BY MR. TORO: Q The

question is I asked you whether Mr. Juan Luis Boscio also proposed some plan to cover up the payment of the commission to him, the payment of the $110,000. Your answer was no.

"Question: There was no interest in covering up that part of the transaction?

"Answer: I will repeat once again. I don't know whether from that point of view of what is legal or in other words because there were public functions there or because he was the president of the Municipal Development Authority of Ponce he earned the money and he worked."

Q Did you testify that?

A Yes, I testified that.

Q "And I did not understand— in other words, I don't think that even he thought that they had to be covered up." I That is what you answered?

MR. PESQUERA: Please continue, Mr. Toro. Finish the answer. I request from the Court that in essence of completeness that the answer is complete.

MR. TORO: Let me get page 252, your Honor.
"And I did understand— in other words, I don't even think I thought that they have to be covered-up. He wanted it in cash."

BY MR. TORO:
Q Is that correct?

THE COURT: What was the last part?

MR. TORO: "Except that he wanted it in cash."

THE WITNESS: You are reading my immunized testimony.

BY MR. TORO:
Q Uh-huh, yes.

A So -

THE COURT: What is your question?

MR. TORO: The question came as the cover-up I was reading the testimony that he gave before the "Camara de Representantes" that Mr. Boscio didn't make the cover-up .

THE COURT: But what is your question now to the witness?

MR. TORO: I was completing his answer, your Honor.

BY MR. TORO:
Q Mr. Serrano, you testified here that you made depositions in different places.

THE COURT: That you what?

MR. TORO: Depositions.

THE COURT: I didn't understand the question. You testified here that you made depositions?
MR. TORO: Yes, that was deposed in different places.

BY MR. TORO

Q And did you ever mention the check of $660,000 in

MR. PESQUERA: Objection, your Honor. That is an overbroad question as to when, where or—

THE COURT: In any of the depositions.

MR. PESQUERA: Pardon?

THE COURT: In any of the depositions.

MR. PESQUERA: Oh.

THE WITNESS: As far as I can recall, in Hacienda and in Shearson and "Camara de Representantes" they all asked me for the $660,000.

BY MR. TORO:
Q And in the deposition that you gave in Shearson/ American Express on the 21st day of October, 1983, at 1:30 at page—

MR. PESQUERA: Your Honor, again the procedure. There hasn't been a question in which to refresh or impeach, and he is about to read from the transcript.

THE COURT: What are you going to rofer to in that part?
MR. TORO: If he did mention— what did he mention of the $660,000 in that deposition. That is the question

THE COURT: In which one?

MR. TORO: In the one given at Shearson/American

THE COURT: Well, ask him to see what his answer

THE WITNESS: In that deposition at Shearson/ American

Express, which was a 54-page deposition dated October 21, 1983, it has 14 areas that are off record. You can count them if you want. What I mentioned about the $660,000 on the record, that it was to purchase certain scheduled loans. That is what I said in that deposition, and then other things were said off record.

BY MR. TORO:
Q Yes, but we are talking of the check of $660,000, Mr. Serrano.

A Exactly. That is what it says. They said, "Did you get the $660,000? What was it used for?"
"It was used to purchase certain scheduled loans."

Q And you also said that the final purpose of those funds—

MR. PESQUERA: Objection, your Honor. Again—

THE COURT: Let him finish the question.

BY MR. TORO:
Q —was to eventually purchase scheduled loans of the mortgage portfolio of Home Federal Savings & Loan?

THE COURT: That is what he said.

THE WITNESS: I just said that.

BY MR. TORO:
Q And this you said under oath?
A Yes. I'd like to— there are 14 off-the-record areas there.

MR. TORO: I have no further questions.

THE COURT: Cross is over. Redirect.

(End of excerpt.)

REPORTER'S CERTIFICATE

I, LAUREL MAZUR, Official Court Reporter in the United States District Court for the District of Puerto Rico and member of the United States Court Reporters' Association and National Shorthand Reporters' Association, appointed pursuant to the provisions of Title 28, United States Code, Section 753;

DO HEREBY CERTIFY that the foregoing transcript is a true and correct excerpt of proceedings had in the within entitled and numbered cause on the date hereinbefore-set forth.

I DO FURTHER CERTIFY that the foregoing transcript has been prepared under my direction.

Laurel Mazur

APPENDIX VIII

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,

Criminal No. 85-449 (CC)

June 10, 1988

vs.
JOSE TORMOS VEGA, and JUAN LUIS BOSCIO,
Defendants.

San Juan, Puerto Rico

TRANSCRIPT OF PROCEEDINGS

REDIRECT EXAMINATION OF MIGUEL A. SERRANO

BEFORE HONORABLE CARMEN CONSUELO CEREZO
UNITED STATES DISTRICT JUDGE

* * *

APPEARANCES: Counsel for the plaintiff: AUSA Ricardo Pesquera Counsel for the defendants: Harry Anduze Montaño, Esq. Nydia Diaz Buxo, Esq. Rafael Toro Cuberge, Esq. Court interpreter: Court reporter: Thomas Kavelin Laurel Mazur

Attorney's Office about Pujol's involvement in this transaction?

I believe it was the day after this document was signed, June 2.

Q Now, referring to the deposition you gave on October 21, 1983, at the offices of McConnel & Valdes, and Mr. Anduze and Mr. Toro, both of them read the part where you give the explanation about the $660,000—

A Yes.

Q -and you stated that the final purpose of those funds was to eventually purchase scheduled loans of the mortgage portfolio of Home Federal Savings & Loan.

A Yes.

Q At this time, October 21, 1983, had you entered into any agreement with the House of Representatives?

A No.

Q Had you entered into any agreement with the local Department of Justice?

A No.

Q Had you entered into any agreement with the federal authorities?

A No.

Q When you testified then in the House of Representative regarding the $660,000, how does that testimony compare

to the one you have given here?

A It's identical. I haven't even refuted what Mr. Toro Cuberge said there. I said I reaffirmed myself in what he was reading.

Q This tape that Mr. Anduze played here, does that have anything to do with the $66 million transaction and the $660,000 commission?

A Well, not really.

Q Why do you say that?

A Well, this has mostly to do with the general Loan to Lenders Program and Universal Iron & Tank loan and everything that happened on indictment number one and that offering of monies was based on that since I had done previous transaction of $660,000 I thought that maybe he wanted to participate and he did.

Q Who recorded that transaction?

A That transaction was recorded by Timothy Peterson.

Q Were you aware that that conversation was being recorded?

A I asked him to record it. QNow, you stated upon questions of Mr. Anduze that you **had paid** off Mr. Pujol through a check issued to his brother-in-law, Mr. Bernardo Quiles.

A That is correct.

Q What transaction were you referring to? From what transaction you paid off Francisco Pujols through the use of Bernardo Quiles?

A The Universal Iron & Tank transaction.

Q And the Universal Iron & Tank transaction does not have anything to do with the $660,000 commission?

A In total scope, yes

Q How?

A When you look at the whole picture.

Q How?

A You see, there was a program established. We were going to refurbish Home Federal Savings & Loan. We were going to refurbish Home Federal Savings & Loan, getting the deposits. They were going to make loans. There would be several repurchase agreements made, et cetera. Specifically the $66 million loan, okay, was getting Pancho off the hook on the transaction he had done. But— but— the collateral that we were receiving there was going to be excellent collateral for the Loan to Lenders. Take a look at the letter, the May 18 letter. It will say that it will be put in as additional collateral.

Q May 18 of what year?

A Of 1983. G I think it is. Exhibit G. If it doesn't appear, the document, the thing is that Ponce Municipal Development Authority and Home Federal, Shearson in these transactions, the Loan to Lender Program cannot be separated. They are totally intermingled, intertwined, which

APPENDIX IX

18 USCS Section 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be made avail-

able to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means- (1) a written statement made by said witness and signed or otherwise adopted or approved by him.

APPENDIX X

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff,
vs .
JOSE TORMOS VEGA, and JUAN LUIS BOSCIO,

Defendats.

Criminal No. 85-449 (CC)
June 10, 1988
San Juan, Puerto Rico

TRANSCRIPT OF PROCEEDINGS
REDIRECT EXAMINATION OF
MIGUEL A. SERRANO
BEFORE HONORABLE
CARMEN CONSUELO CEREZO
UNITED STATES DISTRICT JUDGE

APPEARANCES: Counsel for the plaintiff: AUSA Ricardo Pesquera Counsel for the defendants: Harry Anduze Montaño, Esq. Nydia Diaz Buxo, Esq. Rafael Toro Cuberge, Esq. Court interpreter: Court reporter: Thomas Kavelin Laurel Mazur.

MR. PESQUERA: Right. That would be-, the Purpose would be to show that everything that appears there is reflected in the evidence in the case already.

THE COURT: If the stipulation were as to a fact witness, then I would consider an insistence that the witness testify, but as to the summary chart-

MR. ANDUZE: Your Honor, the comment that Mr. Toro makes is I believe very well taken that the only discrepancy- we are naturally not accepting that this is true. What we are accepting is that the— that that is the theory of the government and that the government will argue that in closing argument. Okay. But there is one correction here concerning the time of the check—ahead, sir.

THE COURT: What ID are you referring to?

MR. ANDUZE: Let me see, your Honor.

MR. PESQUERA: That would be ID 36 (b) . -

MR. ANDUZE: ID 36(b). It has-

THE COURT: Raise it, please, on the chair. Go

MR. ANDUZE: Excuse me a moment, your Honor. MR. TORO: It was a misunderstanding.

THE COURT: So you withdraw your objection?

MR. TORO: I withdraw my objection, yes.

THE COURT: All right. So-

MR. ANDUZE: But to clarify the record, what we are

agreeing is that it will be unnecessary for the foundation witness to testify for Mr. Pesquera to be able to present the charts.

THE COURT: As exhibits.

MR. ANDUZE: As an exhibit. We are not admitting or accepting or stipulating to the veracity.

THE COURT: That is clear.

MR. ANDUZE: Okay, on the contents of the exhibits.

THE COURT: Now, since it is not necessary for the jury to be present for the Court to admit an exhibit, I will order that they be marked as exhibits now. I must remind you that these exhibits will go like any other evidence to the jury.

MR. ANDUZE: We understand that, your Honor.

THE COURT: So this will be Exhibit 34 and Exhibit 35. (The aforementioned documents are received and marked Government's Exhibit Nos. 34 and 35.)

THE COURT: So that means after Mr. Serrano concludes his testimony you would be resting your case in chief?

MR. PESQUERA: The government— it is 99 percent sure that the government will rest. There may be something that comes up in the recross that I need to bring another witness, but it is not expected. THE COURT: All right. The Court adjourns. (The Court adjourns.)

* * *

REPORTER'S CERTIFICATE

I, LAUREL MAZUR, Official Court Reporter in the United

States District Court for the District of Puerto Rico and member of the United States Court Reporters Association and National Shorthand Reporters Association, appointed pursuant to the provisions of Title 28, United States Code, Section 753;

DO HEREBY CERTIFY that the foregoing transcript is a true and correct excerpt of proceedings had in the within entitled and numbered cause on the date herein before set forth.

I DO FURTHER CERTIFY that the foregoing transcript has been prepared under my direction.

APPENDIX XI

Supreme Court of the United States

No.

A-892

Juan Luis Boscio
Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 17, 1992., motion to exceed page length is denied.

/s/ D.H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 26th
day of May, 1992.